No. 02-1597 Status: DECIDED
Title: Michael Yarborough, Warden, et al., Petitioners
v.
Lionel E. Gentry
Docketed: May 5, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-55691)
Decision Date: August 8, 2002
Rehearing Denied: January 28, 2003

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Apr 28 2003 | Petition for writ of certiorari filed. (Response due June 4, 2003) |
| Jun 4 2003 | Brief of respondent Lionel E. Gentry in opposition filed. |
| Jun 4 2003 | Motion for leave to proceed in forma pauperis filed by respondent Lionel E. Gentry. |
| Jun 18 2003 | DISTRIBUTED for Conference of September 29, 2003. |
| Sep 30 2003 | Record Requested . |
| Oct 2 2003 | Record received. USCA-9 (one envelope); USDC Central Dist. of CA (two folders). |
| Oct 6 2003 | Appellant's Excerpts of Record Received from USCA-9. |
| Oct 6 2003 | DISTRIBUTED for Conference of October 10, 2003. |
| Oct 14 2003 | DISTRIBUTED for Conference of October 17, 2003. |
| Oct 20 2003 | Motion for leave to proceed in forma pauperis filed by respondent GRANTED. |
| Oct 20 2003 | Judgment REVERSED. Opinion per curiam. |

(2)



Per Curiam

# SUPREME COURT OF THE UNITED STATES

## MICHAEL YARBOROUGH, WARDEN, ET AL. *v.* LIONEL E. GENTRY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02–1597. Decided October 20, 2003

PER CURIAM.

I

Respondent Lionel Gentry was convicted in California state court of assault with a deadly weapon for stabbing his girlfriend, Tanaysha Handy. Gentry claimed he stabbed her accidentally during a dispute with a drug dealer.

Handy testified for the prosecution. She stated that she recalled being stabbed but could not remember the details of the incident. The prosecution then confronted Handy with her testimony from a preliminary hearing that Gentry had placed his hand around her throat before stabbing her twice.

Albert Williams, a security guard in a neighboring building, testified that he saw Gentry, Handy, and another man from his third-floor window. According to Williams, Gentry swung his hand into Handy's left side with some object, causing her to lean forward and scream. Williams was inconsistent about the quality of light at the time, stating variously that it was "pretty dark" or "getting dark," that "it wasn't that dark," and that the area of the stabbing was "lighted up." See *Gentry* v. *Roe*, 320 F. 3d 891, 896–897 (CA9 2003).

Gentry testified in his own defense that he had stabbed Handy accidentally while pushing her out of the way. When asked about prior convictions, he falsely stated that he had been convicted only once; evidence showed he had

11 7

been separately convicted of burglary, grand theft, battery on a peace officer, and being a felon in possession of a firearm. He attributed his error to confusion about whether a plea bargain counted as a conviction.

In her closing argument, the prosecutor expressed sympathy for Handy's plight as a pregnant, drug-addicted mother of three and highlighted her damaging preliminary hearing testimony. She accused Gentry of telling the jury a "pack of lies." See *id.*, at 897–898. Defense counsel responded with the following closing argument:

> "'I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D. A. that wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the truth chair. You heard people testify. You heard good things that made you feel good. You heard bad things that made you feel bad.
>
> "'I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.
>
> "'The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.
>
> "'He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.
>
> "'I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just [me]. I'm not one of the 12 over there.
>
> "'All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.
>
> "'You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that

> they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.
>
> "'So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.
>
> "'Thank you.'" *Id.*, at 898–899 (one paragraph break omitted).

After deliberating for about six hours, the jury convicted.

On direct appeal, Gentry argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The California Court of Appeal rejected that contention, and the California Supreme Court denied review. Gentry's petition for federal habeas relief was denied by the District Court, but the Court of Appeals for the Ninth Circuit reversed. We grant the State's petition for a writ of certiorari and the motion for leave to proceed *in forma pauperis* and reverse.

II

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense. *Wiggins* v. *Smith*, 539 U. S. __, __ (2003) (slip op., at 8); *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable. *Wiggins*, *supra*, at __ (slip op., at 8); *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam)*; *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000).



The right to effective assistance extends to closing arguments. See *Bell* v. *Cone*, 535 U. S. 685, 701–702 (2002); *Herring* v. *New York*, 422 U. S. 853, 865 (1975). Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," *id.*, at 862, but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. See *Bell*, *supra*, at 701–702. Judicial review of a defense attorney's summation is therefore highly deferential—and doubly deferential when it is conducted through the lens of federal habeas.

In light of these principles, the Ninth Circuit erred in finding the California Court of Appeal's decision objectively unreasonable. The California court's opinion cited state case law setting forth the correct federal standard for evaluating ineffective-assistance claims and concluded that counsel's performance was not ineffective. That conclusion was supported by the record. The summation for the defense made several key points: that Williams's testimony about the quality of light was inconsistent; that Handy's personal circumstances were irrelevant to Gentry's guilt; that the case turned on whether the stabbing was accidental, and the jury had to acquit if it believed Gentry's version of events; that Gentry's criminal history was irrelevant to his guilt, particularly given the seriousness of the charge compared to his prior theft offenses; and that Gentry's misstatement of the number of times he had been convicted could be explained by his lack of education.

Woven through these issues was a unifying theme—that the jury, like the prosecutor and defense counsel himself, were not at the scene of the crime and so could only speculate about what had happened and who was lying.

The Ninth Circuit rejected the state court's conclusion in large part because counsel did not highlight various other potentially exculpatory pieces of evidence: that Handy had used drugs on the day of the stabbing and during the early morning hours of the day of her preliminary hearing; that Williams's inability to see the stabbing clearly was relevant to the issue of intent; that Gentry's testimony was consistent with Williams's in some respects; that the government did not call as a witness Williams's co-worker, who also saw the stabbing; that the stab wound was only one inch deep, suggesting it may have been accidental; that Handy testified she had been stabbed twice, but only had one wound; and that Gentry, after being confronted by Williams, did not try to retrieve his weapon but instead moved toward Handy while repeating, "she's my girlfriend." See 320 F. 3d, at 900–901.

These other potential arguments do not establish that the state court's decision was unreasonable. Some of the omitted items, such as Gentry's reaction to Williams, are thoroughly ambiguous. Some of the others might well have backfired. For example, although Handy claimed at trial she had used drugs before the preliminary hearing, she testified at the hearing that she was not under the influence and could remember exactly what had happened the day of the stabbing. And, although Handy's wound was only one inch deep, it still lacerated her stomach and diaphragm, spilling the stomach's contents into her chest cavity and requiring almost two hours of surgery. These are facts that the prosecutor could have exploited to great advantage in her rebuttal.

Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel



was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach. As one expert advises: "The number of issues introduced should definitely be restricted. Research suggests that there is an upper limit to the number of issues or arguments an attorney can present and still have persuasive effect." R. Matlon, Opening Statements/Closing Arguments 60 (1993) (citing Calder, Insko, & Yandei, The Relation of Cognitive and Memorial Process to Persuasion in a Simulated Jury Trial, 4 J. Applied Social Psychology 62 (1974)). Another authority says: "The advocate is not required to summarize or comment upon all the facts, opinions, inferences, and law involved in a case. A decision not to address an issue, an opponent's theory, or a particular fact should be based on an analysis of the importance of that subject and the ability of the advocate and the opponent to explain persuasively the position to the fact finder." R. Haydock & J. Sonsteng, Advocacy: Opening and Closing §3.10, p. 70 (1994). In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion.

When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U. S., at 690 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment). That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *Massaro* v. *United States*, 538 U. S. __, __ (2003) (slip op., at 4). Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with

the benefit of hindsight. See *Bell*, 535 U. S., at 702; *Kimmelman* v. *Morrison*, 477 U. S. 365, 382 (1986); *Strickland*, *supra*, at 689; *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). To recall the words of Justice (and former Solicitor General) Jackson: "I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." Advocacy Before the Supreme Court, 37 A. B. A. J. 801, 803 (1951). Based on the record in this case, a state court could reasonably conclude that Gentry had failed to rebut the presumption of adequate assistance. Counsel plainly put to the jury the centerpiece of his case: that the only testimony regarding what had happened that the jury heard "come from the truth chair" was conflicting; that none of his client's testimony was demonstrably a lie; and that the testimony contradicting his client came in "three versions." See 320 F. 3d, at 898. The issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude.

The Ninth Circuit found other flaws in counsel's presentation. It criticized him for mentioning "a host of details that hurt his client's position, none of which mattered as a matter of law." *Id.*, at 900. Of course the reason counsel mentioned those details was precisely to remind the jury that they *were* legally irrelevant. That was not an unreasonable tactic. See F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials §19:23, p. 461 (2d ed. 1985) ("Face up to [the defendant's] defects . . . [and] call upon the jury to disregard everything not connected to the crime with which he is charged"). The Ninth Circuit singled out for censure counsel's argument that the jury must acquit if Gentry was telling the truth, even though he was a "bad



person, lousy drug addict, stinking thief, jail bird." See 320 F. 3d, at 900. It apparently viewed the remark as a gratuitous swipe at Gentry's character. While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument §204, p. 10 (1992–1996) ("[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). As Judge Kleinfeld pointed out in dissenting from denial of rehearing en banc, the court's criticism applies just as well to Clarence Darrow's closing argument in the Leopold and Loeb case: "'I do not know how much salvage there is in these two boys. . . . [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind.'" 320 F. 3d, at 895 (quoting Famous American Jury Speeches 1086 (Hicks ed. 1925) (reprint 1990)).

The Ninth Circuit rebuked counsel for making only a passive request that the jury reach some verdict, rather than an express demand for acquittal. But given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable. One treatise recommends just such a technique: "Avoid challenging the jury to find for your client, or phrasing your argument in terms suggesting what their finding must be. . . . [S]cientific research indicates that jurors will react against a lawyer who they think is bla-

tantly trying to limit their freedom of thought." Stein, *supra*, §206, at 15.

The Ninth Circuit faulted counsel for not arguing explicitly that the government had failed to prove guilt beyond a reasonable doubt. Counsel's entire presentation, however, made just that point. He repeatedly stressed that no one—not the prosecutor, the jury, nor even himself—could be sure who was telling the truth. This is the very essence of a reasonable-doubt argument. To be sure, he did not insist that the existence of a reasonable doubt would *require* the jury to acquit—but he could count on the judge's charge to remind them of that requirement, and by doing so he would preserve his strategy of appearing as the friend of jury autonomy.

Finally, the Ninth Circuit criticized counsel's approach on the ground that, by confessing that he too could not be sure of the truth, counsel "implied that even he did not believe Gentry's testimony." 320 F. 3d, at 900. But there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle. See P. Lagarias, Effective Closing Argument §§2.05–2.06, pp. 99–101 (1989) (citing Aristotle's Rhetoric for the point that "[a] speech should indicate to the audience that the speaker shares the attitudes of the listener, so that, in turn, the listener will respond positively to the views of the speaker"); *id.*, §3.03, at 112 (deriving from this principle the advice that "counsel may couch his arguments in terms of 'we,' rather than 'you, the jury'").

To be sure, Gentry's lawyer was no Aristotle or even Clarence Darrow. But the Ninth Circuit's conclusion—not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable—gives too little deference to the state courts that have primary responsibility for supervising defense



counsel in state criminal trials.

* * *

The judgment of the Ninth Circuit is reversed.

*It is so ordered.*

Supreme Court, U.S.
FILED

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# IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL YARBOROUGH, Warden, et al., *Petitioners,*

v.

LIONEL GENTRY, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under the federal habeas corpus statute, a federal court may not grant relief to a state prisoner on a claim adjudicated on its merits in state court unless, *inter alia*, the state court's ruling was "an unreasonable application of" clearly established federal law as determined by this Court. See 28 U.S.C. § 2254(d)(1).

The Question Presented is:

Whether the Ninth Circuit violated § 2254(d)(1)—and erred under this Court's recent decisions in *Lockyer* v. *Andrade*, 123 S.Ct. 1166 (2003), *Early* v. *Packer*, 123 S.Ct. 362 (2002) (per curiam), *Woodford* v. *Visciotti*, 123 S.Ct. 357 (2002) (per curiam), *Bell* v. *Cone*, 535 U.S. 685 (2002), and *Williams* v. *Taylor*, 529 U.S. 362 (2000)—by concluding that the state court's rejection of respondent's ineffective-counsel claim was "unreasonable," and doing so simply because the panel considered the state court ruling to be incorrect.

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| **The Ninth Circuit again has violated § 2254(d)(1), and has applied a standard of review different from that prescribed by *Lockyer* v. *Andrade*, *Woodford* v. *Visciotti*, *Early* v. *Packer*, *Bell* v. *Cone*, and *Williams* v. *Taylor*, by granting relief on the basis of an erroneous and automatic conclusion that the underlying ruling of the state court was "objectively unreasonable" simply because the panel majority thought the state ruling to be incorrect.** | 6 |
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## IN THE SUPREME COURT OF THE UNITED STATES

No.

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MICHAEL YARBOROUGH, Warden, et al., *Petitioners,*

v.

LIONEL GENTRY, *Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

Michael Yarborough, Warden of the California State Prison at Lancaster, California (the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit panel majority's second amended opinion, the amended dissent from that opinion, and the four-judge dissent from the denial of rehearing en banc is reported at 320 F.3d 891 (9th Cir. 2003). The Ninth Circuit panel majority's original opinion, and the dissent therefrom, is reported at 300 F.3d 1007 (9th Cir. 2002). The first amended opinion and dissent are not reported. The order of the United States District Court for the Central District of California and the opinion of the California Court of Appeal are also unreported. All opinions and orders, however, are reproduced in the Appendix (App.) to this Petition.

## STATEMENT OF JURISDICTION

The Ninth Circuit filed judgment granting habeas corpus relief on August 8, 2002. App. C1. The State's petition for rehearing and suggestion for rehearing en banc was denied on January 28, 2003. App. A6. The jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2254(d)(1) of Title 28 of the United States Code provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

## STATEMENT OF THE CASE

Respondent Lionel Gentry was convicted for assault with a deadly weapon against his girlfriend, Tanaysha Handy. At his trial, the only contested question for the jury was whether Gentry had stabbed Miss Handy intentionally rather than accidentally. Miss Handy testified that she and Gentry had argued and that she had been stabbed twice. The prosecution then introduced a transcript from the preliminary hearing, at which Miss Handy had testified that it was Gentry who had stabbed her during the argument. In addition, the prosecution produced an eyewitness, security guard Albert Williams, who testified that he had heard the argument; that he had looked out a window to see Gentry and Miss Handy standing together; and



that he then had seen Gentry turn and swing an object at Miss Handy, who leaned forward and let out a scream. There followed a struggle in which Miss Handy grabbed from Gentry's hand what Williams saw to be a bloody knife; and, when Williams intervened, Gentry tried to get to Miss Handy again while holding the knife in his hand. Finally, a doctor testified that Miss Handy had sustained one stab wound, lacerating her stomach and diaphragm, and that treatment for it required a two-hour surgery and a week of hospitalization. App. D2-D3, E2-E3.

Gentry testified in his own defense. He stated that he had drawn his knife during an altercation with a drug dealer and, when Miss Handy intervened, he had stabbed her accidentally. He also denied that he had suffered certain prior felony convictions, which he later admitted when confronted by the prosecutor in cross-examination. App. D3, E3.

In closing argument, see App. A15-A17, defense counsel asserted that only those who were at the scene could be sure what had happened; that Williams had given inconsistent accounts of the available lighting at the time of the stabbing; that the prosecution's evidence and argument about Gentry's criminal history and Miss Handy's personal circumstances were immaterial to the question of what had happened at the time of the stabbing; and that Gentry's denial of prior convictions was a result of his confusion and not of any dishonesty anyway. Thus, he argued:

> The question is, did he intend to stab her? He said he did it by accident. If he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty.

The jury, after deliberating for six hours, found Gentry guilty. For the deadly-weapon assault and the infliction of great bodily injury, the court sentenced him to state prison for a term of thirty-nine-years to life. App. A9, E1.

On direct appeal in state court, Gentry asserted that his trial counsel had rendered unconstitutionally ineffective assistance on grounds that his summation was not actually "argument," but instead a pro forma statement that failed to articulate the basis of the defense, never mentioned the reasonable-doubt standard, and did not ask the jurors to acquit or give them a creditable reason for doing so. The California Court of Appeal rejected Gentry's claim on the merits. App. E6-E8. The appellate court noted that counsel had "addressed pertinent issues . . . including the reliability of Williams' testimony, whether [Gentry] intended to stab Handy, and the significance of the prior conviction impeachment evidence." "Based on that, the entirety of counsel's argument, and the overwhelming evidence of [Gentry's] guilt," the court concluded that Gentry had not been denied his right to effective counsel. App. E7.

In later federal habeas corpus proceedings, the federal district court found the state court's decision to be reasonable within the meaning of 28 U.S.C. § 2254(d)(1) and denied habeas relief. App. D8-D10. The court observed that counsel had identified the primary issue, that he had argued there were inconsistencies in witness Williams' testimony, and that he had referred to Gentry's criminal background as a tactic to establish credibility with the jury and to illustrate that the jury should focus on the testimony about the actual stabbing instead. App. D9.

Gentry appealed, and the Ninth Circuit reversed in a 2-to-1 decision. In the original and first amended opinions—issued on August 8, 2002, and August 30, 2002, respectively—the panel majority framed the primary issue as "whether trial counsel's closing argument on behalf of petitioner Lionel Gentry constituted ineffective assistance," decided that counsel's closing argument had been both deficient and prejudicial, and granted habeas corpus relief. App. B5-B6, C5. In the majority's view, counsel had mentioned irrelevant matters that hurt his client, had failed to mention matters that would have helped him, and had never asked the jury to acquit him. App. B13, C13. The State sought rehearing. In a second amended



opinion, issued upon denial of rehearing on January 28, 2003, the majority re-worded the opinion to state the issue as "whether the California Court of Appeal's decision that petitioner Lionel Gentry did not receive ineffective assistance of counsel during closing argument was an objectively unreasonable application of federal law." App. A12. The amended opinion also included a two-word answer to that question: "It was." App. A12. The panel majority never offered any reason for that conclusion beyond its own determination that the state court had erred.[1] App. A12. The second amended opinion thus re-affirmed the directive for the district court with directions to grant the petition for writ of habeas corpus unless the state retried Gentry within a reasonable period. App. A24. In dissent, Judge Silverman criticized the majority for reviewing the claim for mere error, as if it had arisen on direct appeal from a federal criminal conviction, rather than applying the deferential standard that governs state-prisoner claims for collateral relief under § 2254. App. A25-A29.

In a further dissent from the denial of en banc re-hearing, Judge Kleinfeld—joined by Judges O'Scannlain, T. Nelson, and Tallman—also criticized the majority as having giving mere "lip service" to the statutory habeas standard but not adhering to it. App. A6. Judge Kleinfeld's dissent stated that the majority had evaded § 2254(d)(1) and had engaged instead in a simple "error" inquiry in contravention of this Court's criticism of such an approach in *Early* v. *Packer*, 123 S.Ct. 362, 366

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1. The panel majority's response to the State's additional argument, that relief also was foreclosed by the nonretroactivity doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), was similarly dismissive. Rejecting the State's *Teague* claim, that the rule under which petitioner sought relief had not been strictly "dictated" by precedent, the panel simply asserted that "a state court considering Gentry's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that *the rule he seeks to apply here–the Sixth Amendment right to effective assistance of counsel*—was required by the Constitution." App. A19 (emphasis added). Thus, the panel treated the Sixth Amendment itself as the specific rule that "dictated" relief in the special *Teague* sense.

(2002) (per curiam), and *Woodford* v. *Visciotti*, 123 S.Ct. 357, 360 (2002) (per curiam). App. A7 [nn. 4, 5]. His dissenting opinion also expressed special concern about the majority's decision "not only because it flies in the face of what the Supreme Court has told us to do, but also because it has the potential to damage the quality of criminal defense in our circuit." App. A10-A11.

The Ninth Circuit has granted the State's request for a stay pending final resolution of the matter by this Court.

## REASON FOR GRANTING CERTIORARI

**The Ninth Circuit again has violated § 2254(d)(1), and has applied a standard of review different from that prescribed by *Lockyer* v. *Andrade, Woodford* v. *Visciotti, Early* v. *Packer, Bell* v. *Cone,* and *Williams* v. *Taylor*, by granting relief on the basis of an erroneous and automatic conclusion that the underlying ruling of the state court was "objectively unreasonable" simply because the panel majority thought the state ruling to be incorrect.**

In enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress profoundly changed the role of the federal habeas corpus courts in order to ensure that state court convictions are given effect to the fullest extent possible under the law. *Bell* v. *Cone,* 535 U.S. at 693. In pursuit of that goal, the AEDPA amended 28 U.S.C. § 2254(d)(1) to limit federal court review to the narrow question of whether the state court's adjudication of the prisoner's claim on the merits resulted in a decision that was "contrary to," or involved an "unreasonable application of," clearly established federal law as set out in this Court's precedents. That narrow question—rather than the question of whether the state court's decision was correct—is "the only [one] that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 123 S.Ct. 1166, 1172 (2003); *Woodford* v. *Visciotti*, 123 S.Ct. at 360.



Thus, as this Court has explained, a state prisoner seeking federal habeas relief on the ground that the state court's adjudication of his ineffective-counsel claim had involved an "unreasonable application" of the clearly established principle set out in *Strickland* v. *Washington*, 466 U.S. 668 (1984), must do more than show that he would have satisfied the *Strickland* test if his claim were reviewed in the first instance. *Visciotti*, 123 S.Ct. at 360-61; *Bell* v. *Cone*, 535 U.S. at 698. "[I]t is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell* at 698; accord: *Visciotti*, 123 S.Ct. at 360-61; *Williams* v. *Taylor*, 529 U.S. 362, 411 (2000); see *Andrade*, 123 S.Ct. at 1172, 1174-75.

As in *Lockyer* and *Visciotti*—in each of which case this Court was constrained to step in and reverse a Ninth Circuit grant of habeas relief under the "unreasonable application" rubric[2]—the Ninth Circuit in this case again has paid mere "lip service" to the only question that matters under § 2254(d)(1). See also *Early* v. *Packer*, 123 S.Ct. 362 (2002) (reversing Ninth Circuit for ignoring (d)(1) standard). It substituted its own intrusive analysis of the merits of Gentry's underlying claim in place of the proper, deferential inquiry into whether the state court's decision, right or wrong, was at least reasonable. Thus, as the text of its opinion shows, the majority obviously reviewed Gentry's ineffective-counsel claim de novo, determined that in its view the state court's judgment was "wrong," and then simply slapped on to the text of the opinion a handful of unexplained and apparently reflexive conclusions

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2. *Visciotti* v. *Woodford*, 288 F.3d 1097 (9th Cir. 2002), *reversed*, 123 S.Ct. 357 (2002) (per curiam); *Andrade* v. *Attorney General*, 270 F.3d 743 (9th Cir. 2001), *reversed sub nom. Lockyer* v. *Andrade*, 123 S.Ct. 1166; see *Packer* v. *Hill*, 291 F.3d 569 (9th Cir. 2002), *reversed sub nom. Early* v. *Packer*, 123 S.Ct. 362 (2002) (per curiam); see also *Garceau* v. *Woodford*, 281 F.3d 919 (9th Cir. 2002), *reversed* 538 U.S. ___, 2003 WL 1477291 (March 25, 2003).

that the state court's decision was "also" unreasonable. App. A12, A18, A23, A24. That there was no serious or separate analysis of the distinct and determinative question of "objective reasonableness" is illustrated further by the fact that the main difference between the panel's original opinions and its last amended one is that the original opinions started off with the explicit statements that the panel was deciding the merits of the underlying ineffective-counsel claim itself, while the last opinion started off instead with the statement that the panel was deciding the question of whether the state court ruling had been "objectively unreasonable"—and answered that question simply with the added two word, "It was." App. A12.

As noted above, this Court granted certiorari and corrected the Ninth Circuit's similar erroneous applications of § 2254(d)(1) in *Lockyer*, *Visciotti,* and *Packer*. The case at bar represents yet another in a line of such cases requiring further review.

A grant of certiorari to correct the Circuit's method of analysis is especially appropriate in this case, for it is highly unlikely that the panel's result was itself even correct. Given the combination of the deferential *Strickland* standard, which itself sets up a "strong presumption" that counsel's performance "might be considered sound trial strategy," 466 U.S. at 689, and the deferential habeas corpus standard of § 2254(d), the "objective" grounds for habeas corpus relief on Gentry's claim necessarily are exceedingly narrow. This is especially true because the challenged conduct involves an inherently subjective and subtle art of credible argumentation and the practical experience trial lawyers bring to it. Here, defense counsel discussed weaknesses in the testimony of the prosecution's witnesses, played on what he asserted to be the inability of the jury to feel certain about precisely what had transpired at the time of the stabbing, and provided the jury with an explicit rationale for acquittal. Further, as Judge Silverman explained in his dissent, "Since counsel's closing argument was no worse than no-closing-argument-at-all, as occurred in . . . *Bell* v. *Cone*, it follows that the California Court of Appeal



cannot be said to have unreasonably applied federal law as determined by the Supreme Court." App. A29. Corroboration of the objective reasonableness of the state court's adjudication validating the competence of the counsel's argument, finally, may be gleaned from the fact that, of the eight state and federal judicial officers who reviewed the issues posed by counsel's performance, only two found the performance to have been deficient or the state court's adjudication to have been unreasonable—and four more federal judges subsequently voted to re-hear the case en banc.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Dated: April 28, 2003

Respectfully submitted,

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Attorney General of California
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APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| LIONEL E. GENTRY,<br>*Petitioner-Appellant,*<br><br>v.<br><br>ERNIE ROE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,<br>*Respondents-Appellees.* | No. 00-55691<br>D.C. No.<br>CV-97-04867-ER-AN<br><br>ORDER AND AMENDED OPINION AND AMENDED DISSENT |

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
July 9, 2002—Pasadena, California

Filed August 8, 2002
Amended August 30, 2002
Further Amended January 28, 2003

Before: Proctor Hug, Jr., Jerome Farris and
Barry G. Silverman, Circuit Judges

Opinion by Judge Farris;
Dissent by Judge Silverman

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that the California Court of Appeal's determination that trial counsel's closing argument—which ignores evidence in the record that helped his client, and highlights record and non-record evidence that hurt his client, including references to his client as a "bad person, lousy drug addict, stinking thief, jail bird" —does not constitute ineffective assistance of counsel is an unreasonable application of clearly established federal law.

Appellant Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue at Gentry's California state court trial was whether he did so intentionally or accidentally. At trial, Handy testified that on the fateful day she had smoked crack cocaine and recalled being stabbed twice. Handy testified that Gentry had not grabbed her, although she had testified at her preliminary hearing that he had. The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a single stab wound. The prosecution's other witness was Albert Williams, a security guard working at a neighboring building, who testified that he and his partner "Pedro" had looked out the window of their third-floor office from where they would see Gentry and Handy, and that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. After the stabbing, Williams and his partner went to assist Handy and found the couple struggling over the knife. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."



The defense case consisted entirely of Gentry's testimony. Gentry testified that he had accidentally stabbed Handy during an altercation with a dope dealer. After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously numerous times. On cross-examination, he was impeached by the prosecution's serial recitation of his prior convictions, all of which he acknowledged in open court while expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

During closing argument, instead of asking the jury to acquit Gentry, his counsel made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel asserted that he did not know what happened or who was lying, implying that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He dit not discuss Handy's unreliable testimony, the relevance of Williams's inability to see the stabbing clearly on the issue of intent, the consistencies between Williams's and Gentry's testimony, the government's failure to produce Williams's partner, who was purportedly a disinterested witness, and the fact that Handy's wound would be consistent with an accidental stabbing if Handy was flimsily clad. Trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon. Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks about Gentry. The California Court of Appeal affirmed his conviction and sentence, deeming trial counsel's closing argument to be an exercise of sound trial strategy that did not prejudice the outcome. The California

Supreme Court denied his petition for review. Gentry's petition for a writ of habeas corpus in federal district court was dismissed.

Gentry appealed.

[1] A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

[2] To prevail on a claim of ineffective assistance of counsel, Gentry had to show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. When considering whether counsel's performance was deficient, courts are highly deferential to counsel's performance, indulging a presumption that under the circumstances, the challenged action might be considered sound trial strategy. To show prejudice, Gentry had to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[3] What was most striking about trial counsel's closing argument was that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that did matter, all of which would have helped his client's position. [4] Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one. The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation.

[5] To demonstrate prejudice, Gentry bore the burden of showing a reasonable probability that, but trial counsel's unprofessional errors, the result of the proceeding would have been different. [6] The sole question was one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony. The other circumstantial evidence was William's testimony that Gentry and Handy struggled over a



knife. [7] The jury was presented with an ineffectual closing argument by defense counsel that failed to address the only aspects of the case that mattered. There was a reasonable probability that the result of te trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeal's decision to the contrary was unreasonable. [8] The judgment of district court had to be reversed.

Judge Silverman dissented, writing that while the sole issue was whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, the majority said virtually nothing about the decision or reasoning of the California Court of Appeal.

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## COUNSEL

James H. Locklin, Deputy Federal Public Defender (argued), Los Angeles, CA, for the petitioner-appellant.

Shawn A. McGahey (argued) and John R. Gorey, Deputy Attorney General of the State of California, for the respondents-appellees.

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## ORDER

The opinion filed August 8, 2002, and amended August 30, 2002, is further amended as reflected in the attached revised opinion. The dissent filed August 8, 2002, is also amended as reflected in the attached revised dissent.

With these amendments, Judges Hug and Farris voted to deny the petition for panel rehearing; Judge Silverman voted to grant the petition. Judge Silverman voted to deny the petition for rehearing en banc and Judges Hug and Farris so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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KLEINFELD, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, T.G. NELSON, and TALLMAN join, dissenting from denial of rehearing en banc:

The panel granted a 28 U.S.C. § 2254 habeas petition on the ground that defense counsel's closing argument fell below the *Strickland*[1] standard.

The panel has given lip service to the statutory habeas standard but hasn't followed it. The opinion gives inadequate deference both to the constitutional analysis of the Court of Appeal of the State of California and to the judgments of defense counsel about how best to argue for his client.

As Judge Silverman correctly pointed out in dissent, the law requires not only that counsel's performance was deficient and that the deficiency was prejudicial, but also that the state court of appeal's decision to the contrary was "objectively unreasonable," all the while "indulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[2] The majority declared the state court's opinion was unreasonable, but made no attempt to show why. The only question we have jurisdiction to answer is whether the state court's opinion was "contrary to, or involved an unreasonable application of, clearly established Federal law,

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1. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002) (internal quotation omitted).



as determined by the Supreme Court of the United States."[3] An *ipse dixit* just isn't enough.

As the Supreme Court recently pointed out, "[t]his readiness to attribute error is inconsistent with the presumption that state courts know and follow the law."[4] The majority makes precisely the error that another recent Supreme Court per curiam summary reversal pointed out, in that it "evaded" § 2254(d)'s requirement by "proceeding to a simple 'error' inquiry."[5] The state judges take the same oath we do, to support the United States Constitution,[6] and they get reviewed by the same court we do, the United States Supreme Court, so the habeas statute quite reasonably prohibits us from substituting our judgment for theirs. Moreover, the Supreme Court has reminded federal courts in the strongest language of our duty to read the state court decisions with the deference appropriate and required by law.

There's no Supreme Court decision upon which the majority relies except for *Strickland*.[7] The majority opinion doesn't quote the state court's *Strickland-Cronic*[8] analysis and try to show that it is unreasonable.

Nor can I make sense of why the majority opines that the state court decision on prejudice is unreasonable. A building security officer testified that he saw Gentry stab his girlfriend Handy, Handy was indeed stabbed, and Gentry admitted that he stabbed her--a "caught red-handed" sort of case. Though he had

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3. 28 U.S.C. § 2254(d).

4. *Woodford v. Visciotti*, --- U.S. ----, ----, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002).

5. *Early v. Packer*, --- U.S. ----, ----, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002).

6. U.S. CONST. ART VI.

7. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

8. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

a long record of serious, violent crimes, Gentry said he'd stabbed her accidentally. That was his defense. The note-worthy feature of counsel's performance is that by showing that the witnesses all told their stories in varying ways on different occasions, he managed to plant enough doubt to keep the jury out for six hours instead of six minutes.

The majority characterizes defense counsel's argument as "passive" and "meek," but without being in the courtroom, observing him through trial, and hearing his tone of voice, there's no basis for this. The trial judge, who was there, said he did "a highly competent job" but "there wasn't all that much that could be done for Mr. Gentry" in view of "the factual evidence."[9/]

The majority faults counsel because "he mentioned a host of details that hurt his client's position," but it has long been understood to be desirable for defense counsel to "meet head on any key facts that are unfavorable to his cause," "face up to [defendant's] defects," and as an overall strategy to get the jury to listen to him, to "use candor and sincerity."[10/] Lawyers are going to be chary of applying this tried and true (and desirable) strategy after they read the majority opinion deeming it below the minimal *Strickland* standard. Apparently they have to bluff their way through oral argument as though the jury didn't know anything about the evidence they just heard.

The majority faults defense counsel's argument about the security guard, but concedes that counsel pointed out the darkness that might have impaired the security officer's view, and that his three descriptions of what he saw were not the same. Since what the security guard said he saw was Gentry stabbing his girlfriend, she was in fact stabbed, and Gentry admitted stabbing her, I can't figure out what else the majority would have defense counsel do about the guard's testimony.

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9. *People v. Gentry*, No. B094949, slip op. at 8 n. 4 (Cal.Ct.App. Jan. 9, 1997).

10. F. LEE BAILEY & HENRY B. ROTHBLATT, *Successful Techniques for Criminal Trials* §§ 284, 289, 317 (1971).



The majority doesn't say. Defense lawyers are going to wonder whether they now have to destroy the credibility of whatever arguments they can make with a straight face by dwelling on attacks on testimony that is the admitted truth.

I doubt that counsel could have kept the jury out for six hours on this lead pipe cinch of a case had counsel not established his credibility by conceding the bad parts, and using the drug-addled condition of Gentry and his girlfriend to argue reasonable doubt. He did so in a way that didn't insult the jury's intelligence. His phrasing that the majority disapproves of, such as "I don't know what happened," obviously meant in context "*you* don't know what happened." This rhetoric sugar-coated the pill of suggesting that the jury didn't know what happened in so plain a case by attributing ignorance (and therefore reasonable doubt) to himself and only implying the ignorance of the jurors.

Defense counsel are now going to be concerned about making this very common sort of reasonable doubt argument. But it's often all they've got. As some public defenders like to say, "A reasonable doubt for a reasonable price." When the criminal justice system works properly (defense counsel perform the noble duty of causing it to work properly in a much higher percentage of cases), they should not be defending many innocent clients, because prosecutors ought to be filtering out of the system cases that can't be proved beyond a reasonable doubt.[11/] That necessarily implies that in many cases, defense counsel doesn't have much to work with.

I am especially concerned about this case, not only because it flies in the face of what the Supreme Court has told us to do, but also because it has the potential to damage the quality of criminal defense in our circuit. We're de-fanging defense

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11. *See, e.g.*, UNITED STATES ATTORNEYS' MANUAL 9-27.220(A), providing an internal administrative practice for United States Attorneys of declining prosecution, even where there is probable cause, unless "the admissible evidence will probably be sufficient to obtain and sustain a conviction," that is, that it will establish guilt beyond a reasonable doubt.

counsel, by limiting flexibility in closing argument, particularly by limiting the techniques counsel can use to establish personal credibility and argue reasonable doubt. The panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under *Strickland,* had he lost, because he conceded that his clients were bad people for whom the death penalty would be merciful: "I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large."[12/]

This case is part of a developing body of circuit law substituting our judgment on defense tactics and presentation for the judgment of defense counsel and of state courts. Most often this occurs in death penalty cases, but the trend is seeping beyond them to more routine cases such as this one. The last thing criminal defendants and the public need is a Ninth Circuit "form book" of approved arguments and strategies, yet that's what we're giving them. We're telling them in great detail how to investigate their cases and forcing them down rabbit tracks that divert their time from better applications, that they have to produce psychiatric evidence though often it's a bad idea, that they have to make an "Officer Krupke" argument[13/] even where

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12. Clarence S. Darrow, *Closing Argument for the Defense in the Leopold-Loeb Murder Trial, in* FAMOUS AMERICAN JURY SPEECHES 1086 (Frederick C. Hicks ed., Legal Classics Library 1989) (1925).

13. "Dear kindly Sergeant Krupke, / You gotta understand, / It's just our bringin' up-ke / That gets us out of hand. / Our mothers all are junkies, / Our fathers all are drunks. /Golly Moses, natcherly we're punks! Gee, Officer Krupke, we're very upset; / We never had the love that ev'ry child oughta get. / We ain't no delinquents, / We're misunderstood. /Deep down inside us there is good!"
STEPHEN SONDHEIM, *Gee, Officer Krupke, in* WEST SIDE STORY



it will produce the same mocking response as it did in the song.[14/] Now they apparently have to make, and refrain from making, arguments according to what we held in *Gentry,* regardless of what they think will most likely persuade the jury to consider seriously whether there is a reasonable doubt.[15/]

This growing body of law is a very bad idea. We ought to have more respect for the dedicated lawyers who defend criminal cases, and respect the judgments and instincts they apply in light of much greater knowledge of their clients and cases than we have. And we ought to have more respect for the considered judgments of our equally learned counterparts on the state courts. Our legal duty under section 2254 and the controlling Supreme Court decisions demands this deference. So does the wise and fair administration of justice.

When criminal defense lawyers shape and present their cases, they ought to be thinking about the jury. They shouldn't be reading their office form book of approved and disapproved Ninth Circuit defense techniques. They should be paying full attention to the jury, not looking over their shoulders at us.

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(1956), *available at* http://www.westsidestory.com/site/level2/lyrics/krupke.html (last visited, Jan. 9, 2003).

14. Id ("Officer Krupke, you've done it again. / This boy don't need a job, he needs a year in the pen. / It ain't just a question of misunderstood; / Deep down inside him, he's no good!").

15. *See, e.g., Rios v. Rocha,* 299 F.3d 796 (9th Cir.2002) (counsel interviewed his client and a witness before choosing a defense strategy but should have interviewed more witnesses); *Jennings v. Woodford,* 290 F.3d 1006 (9th Cir.2002) (counsel should investigate the possibility of an insanity defense even though pursuing an alibi defense); *Karis v. Calderon,* 283 F.3d 1117 (9th Cir.2002) (counsel must put on evidence of an abusive childhood); *Turner v. Calderon,* 281 F.3d 851 (9th Cir.2002) (counsel should present evidence of drug use and "difficult childhood"); *Phillips v. Woodford,* 267 F.3d 966 (9th Cir.2001) (counsel must investigate a theory of defense that contradicts what his client has told him); *Caro v. Calderon,* 165 F.3d 1223 (9th Cir.1999) (counsel must present a brain damage from pesticides theory even if the medical experts he consults do not suggest it).

## OPINION

FARRIS, Circuit Judge:

We are asked to decide whether the California Court of Appeal's decision that petitioner Lionel Gentry did not receive ineffective assistance of counsel during closing argument was an objectively unreasonable application of federal law. It was. Trial counsel's election to ignore evidence in the record that helped his client and to highlight record and non-record evidence that hurt his client cannot be defended as non-prejudicial "trial strategy." We therefore reverse his conviction with instructions to grant the writ of habeas corpus unless the State chooses to retry Gentry.

### I

There is no question that on April 30, 1994, Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue was whether he did so intentionally or accidentally.

#### A. The Prosecution's Case

For a year and a half preceding the stabbing, Gentry and Handy lived together as boyfriend and girlfriend. At trial, Handy testified that on the fateful day she smoked crack cocaine and later went with Gentry to her aunt's apartment. Once there, she and her aunt smoked cocaine. She then departed for another apartment in the building, a "crack house," where she smoked more cocaine and drank liquor. Later that night, Gentry came to get her, they argued, and at some point she was stabbed. Handy could not remember the details of what happened.

Faced with her inability to recall the events of April 30th, the prosecution showed Handy her preliminary hearing testimony. Although Handy recalled testifying at the



preliminary hearing, she couldn't remember most of the answers reflected in the transcript, including the events surrounding the stabbing. At the preliminary hearing, Handy testified that Gentry had placed his hand around her throat and later stabbed her twice, the second stab wound landing a few inches away from the first wound. At trial, Handy testified that Gentry never grabbed her, but recalled being stabbed twice.

The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a *single* stab wound.

The prosecution's other witness was Albert Williams, a security guard working at a neighboring building. He testified that, at about 9:45 p.m., his attention was drawn to the nearby building when he heard a man and woman arguing. Williams and his partner Pedro looked out the window of their third- floor office from where they could see Gentry and Handy as well as another man about 15 feet ahead of the couple. Although he testified at the preliminary hearing that it was "pretty dark," Williams testified at trial that it was "getting dark" and "it wasn't that dark." Upon redirect examination, he said that the area where the stabbing took place was "lighted up."

Williams testified that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. He saw Gentry "grab[ ] her from falling to the floor." He then witnessed Handy try to push him away while grabbing for the unidentified object in Gentry's hand. At about this time, the second, unidentified man left Williams' field of vision.

After the stabbing, Williams and his partner Pedro left the third-floor landing of their building, went down two flights of stairs to the first floor, and jumped a six-foot-high gate to assist Handy. He found the couple struggling over the knife. Williams heard Gentry and Handy saying things to one another but could not remember what they said. Williams and his partner Pedro intervened and subdued Gentry. Gentry never tried to run away and never punched at Williams or Pedro.

Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."

**B. The Defense Case**

The defense case consisted entirely of Gentry's testimony. According to Gentry, at about 10 p.m., he went looking for Handy within her aunt's building. He found her getting high in a first-floor apartment "crack house." To get to that apartment, Gentry had to pass through a gate, but because he did not have a key, he used a knife from the aunt's apartment to open the lock. When he entered the apartment, Handy was in a back room with another man. Gentry and Handy began arguing and left the apartment, to be followed by a dope dealer. As they were walking down the alleyway between buildings, Gentry and the other man, the dope dealer, got into a physical altercation. Handy tried to intervene several times by grabbing Gentry; he repeatedly pushed her away. At some point, Gentry threatened the dope dealer with the knife and when Handy tried to intervene again, he pushed her away with his right hand, which carried the knife, and accidentally stabbed her. The dope dealer then ran off.

At first, Gentry neither realized nor believed that he had stabbed Handy, but once he figured out what had happened, he tried to help her. Williams and his partner then arrived on the scene and told him to back away from Handy. Gentry refused, repeatedly saying "that's my woman," until finally he was handcuffed by Williams and Pedro. Gentry testified that he never intended to stab Handy.

After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously of burglary, grand theft, battery on a police officer, and being a felon in possession of a firearm. On direct examination, he expressed confusion over whether the term "conviction" covered "plea bargains." On cross-examination, he was impeached by the prosecution's serial recitation of his



prior convictions, all of which he acknowledged in open court while still expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

**C. Closing Arguments**

In her closing argument, the prosecutor zealously advocated for a guilty verdict. She expressed sympathy for Handy and her unfortunate circumstances-- the fact that Handy was a pregnant drug-addict with three children--and argued that Handy's preliminary hearing testimony should be believed despite her protestations at trial that she could not remember what had happened. The prosecutor then argued that Gentry's testimony was "a pack of lies," and that the testimony of eye-witness Williams, who had no reason to lie, contradicted Gentry's version of the events.

In contrast, defense counsel's summation to the jury was casual and perfunctory. The argument in its entirety was as follows:

> I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D.A. that wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light.
>
> Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the

truth chair. You heard people testify. You heard good things that made you feel good. You heard bad things that made you feel bad.

I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.

The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.

He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.

I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just [me]. I'm not one of the 12 over there.

All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a



decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.

So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.

Thank you.

In her rebuttal argument, the prosecutor capitalized on the weakness of defense counsel's summation. She pointed out that, despite defense counsel's suggestion to the contrary, the jury could and should decide who was lying and who was telling the truth, as is consistent with the concept of a trial by jury. She then repeated that Williams' testimony was believable, dispositive, and clearly contradicted Gentry's testimony.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon in violation of California Penal Code §§ 254(A)(1) and 12022.7(a). Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks about Gentry. The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry then petitioned for a writ of habeas corpus in the district court. The magistrate judge issued a report and recommendation recommending dismissal of the petition with prejudice. The district court adopted the R & R and dismissed the petition. Gentry then appealed.

We granted a Certificate of Appealability limited to the issue of whether defense counsel's summation violated Gentry's Sixth Amendment right to effective assistance of counsel.

## II

[1][2] We review *de novo* the district court's denial of Gentry's 28 U.S.C. § 2254 habeas petition. *See Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000). A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or were "based on an unreasonable determination of the facts in light of the evidence presented in the state courts." 28 U.S.C. § 2254(d). "[I]t is not enough that the defendant convinces the federal court that, in its independent judgment, the state-court decision" applied the law incorrectly. *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Rather, to warrant habeas relief, the defendant must show that the state court applied federal law to the facts of his case in an "objectively unreasonable manner." *Id.*

The California Court of Appeal deemed trial counsel's closing argument to be an exercise of sound trial strategy that did not prejudice the outcome. We find that conclusion to be not only incorrect, but also to be an objectively unreasonable application of federal law.



## III

Before reaching the merits, we ask the threshold question of whether the nonretroactivity principle of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), prevents us from granting habeas corpus relief based on a new constitutional rule announced after Gentry's conviction and sentence became final. *See Horn v. Banks,* 536 U.S. 266, 122 S.Ct. 2147, 2150, 153 L.Ed.2d 301 (2002); *Caspari v. Bohlen,* 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). We find that a state court considering Gentry's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks to apply here--the Sixth Amendment right to effective assistance of counsel--was required by the Constitution. *See Caspari,* 510 U.S. at 390, 114 S.Ct. 948 (1994). Indeed, the California Court of Appeal explicitly examined this claim.

[3][4][5] To prevail on a claim of ineffective assistance of counsel, Gentry must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.[1] *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Visciotti v. Woodford,* 288 F.3d 1097, 1105 (9th Cir.2002). When considering whether counsel's performance was deficient, we are highly deferential to counsel's performance, indulging a presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Bell,* 122 S.Ct. at 1852 (internal quotations omitted). To show prejudice, Gentry must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

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1. At oral argument, Gentry conceded that the Supreme Court's recent decision in *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), made it clear that *Strickland's* requirement that a defendant show both a deficiency and prejudice applies to the circumstances presented here. We therefore do not address his abandoned argument that prejudice should be presumed in accordance with *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

been different." *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

**A. Deficient Performance**

[6][7] Gentry "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. The California Court of Appeal determined that the performance of Gentry's counsel was not deficient, reasoning that he "addressed pertinent issues of the case, including the reliability of Williams's testimony, whether [Gentry] intended to stab Ha[n]dy, and the significance of the prior impeachment evidence." That conclusion is objectively unreasonable.

What is most striking about trial counsel's closing argument is that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that *did* matter, all of which would have helped his client's position. Instead of asking the jury to acquit his client, he made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel's assertions that he did not know "what happened" or "who is lying" implied that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He didn't discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner "Pedro" who was purportedly a disinterested witness, and the fact that a one-inch deep wound inflicted by a six-inch knife would be consistent with an accidental stabbing if Handy was flimsily clad. Beyond the meek, personal statement "I don't know what happened," trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.



The prosecution's case hinged on (1) the jury believing Handy's preliminary hearing testimony and disbelieving her trial testimony, and (2) the jury accepting that Williams' testimony contradicted Gentry's testimony and indicated Gentry's intent to stab Handy. Defense counsel never discussed Handy's testimony, instead choosing to react to the prosecutor's expression of sympathy to the victim by noting, "I don't care that Tanaysha is pregnant. I don't care that she has three children.... What does that have to do with this case?" His sole reference to Williams' testimony was "Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw."

Trifling comments about inconsequential aspects of the case cannot be excused as trial strategy. At trial, Handy testified that at the time of her stabbing, she had been using crack cocaine "24 hours a day" for more than five years. She had also smoked "a lot" of crack in the early morning hours on the day of the preliminary hearing and was feeling its effects when she testified. She acknowledged that when she is high, she sees "weird things," including ghosts. She testified at trial and at the preliminary hearing that she was stabbed twice when there is no question she was stabbed only once. In closing argument, defense counsel mentioned none of this.

Williams' testimony is not inconsistent with an accidental stabbing. From the third floor of a neighboring building, Williams witnessed Gentry strike Handy with an object later found to be a knife. Williams testified that after he ran downstairs and hopped over a fence, all three of them struggled over the knife, but when the knife fell to the ground, Gentry didn't try to retrieve it, he kept moving toward Handy while saying again and again, "she's my girlfriend." Williams' testimony about the lighting is important, but only to the extent to which it casts doubt on the conclusion that Gentry stabbed Handy intentionally. Trial counsel's only comment on any part of Williams' testimony was "[t]hose are the three versions of his testimony with regard to what he saw and what he saw." Such

statements qualify, at best, as passive recitations of facts, not as argumentation.

Gentry's version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was at times agitated, confused, and evasive. He demonstrated the stabbing by inappropriately touching the prosecutor. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of Gentry's testimony may, in fact, be true, even in light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument. *See, e.g., United States v. Swanson,* 943 F.2d 1070 (9th Cir.1991) (finding defense counsel's representation to be deficient where he conceded in closing argument that no reasonable doubt existed and proceeded to discuss the importance of the judicial system).

Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one:

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact there may be reasonable doubt of the defendant's guilt....
>
> .... In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.



*Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation. The California Court of Appeal's decision to the contrary was unreasonable.

**B. Prejudicial Effect**

[8][9] To demonstrate prejudice, Gentry bears the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. "A 'reasonable probability' is *less than* a preponderance: [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Visciotti,* 288 F.3d at 1108(quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

The California Court of Appeal found there to be "overwhelming evidence of [Gentry's] guilt." We disagree. The sole question is one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony that Gentry grabbed her throat before stabbing her twice, testimony given under the influence of crack cocaine, later disavowed, and shown to be inconsistent with the physical evidence of a single stab wound. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife, an object that was later dropped and ignored in Gentry's attempt to get closer to his girlfriend.

The jury was presented with an ineffectual closing argument by defense counsel that failed to address the only aspects of the case that mattered. Nevertheless, the jury deliberated for six hours before returning a verdict. We find there to be a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient

performance during closing argument. The California Court of Appeal's decision to the contrary was unreasonable.[2/]

## IV

Trial counsel's rambling, perfunctory closing argument violated petitioner Lionel Gentry's Sixth Amendment right to effective assistance of counsel. The California Court of Appeal's decision to the contrary was an objectively unreasonable application of federal law. We reverse the district court's denial of a writ of habeas corpus, vacate Gentry's

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2. My brother in dissent focuses so strongly on the language of the holding in *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) that he overlooks its rationale. *Bell* concerned a defense attorney's failure to give a closing argument in the penalty phase of a capital trial. The Supreme Court rejected the defendant's claim that this constituted presumptively prejudicial ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Instead, it held that the attorney's waiver of summation had to be evaluated under the standard two-prong *Strickland* test. *Bell*, 122 S.Ct. at 1850-52.

When the Supreme Court applied *Strickland* to the particular facts in *Bell*, it noted that the defense presented considerable mitigating evidence to the jury during the guilt phase. Defense counsel highlighted this evidence in his opening statement to the jury at the penalty phase. Afterwards, the prosecution failed to put on any particularly dramatic or impressive aggravating evidence. Then, when the junior prosecutor delivered a "low-key" closing that did not dwell on any of the horribly brutal aspects of the defendant's senseless murder of two elderly people in their home, defense counsel faced a strategic choice: he could present a closing that would repeat for the jury the mitigating evidence already discussed in his opening statement, but that would give the lead prosecutor (who all agreed was "very persuasive") the chance to present a compelling rebuttal argument to the jury portraying the defendant as a heartless killer; or he could prevent the lead prosecutor from giving such an argument by waiving his own summation and relying on the jury's recollection of the opening defense statement he made just a few hours earlier. The Supreme Court held that neither option so clearly outweighed the other that it was objectively unreasonable for the state court to categorize counsel's choice to waive argument as a valid tactical decision. *Bell*, 122 S.Ct. at 1852-54.



conviction, and remand to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period grants a new trial.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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SILVERMAN, Circuit Judge, dissenting:

The sole question before us is whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. Despite this, my colleagues in the majority say virtually nothing about the decision or reasoning of the California Court of Appeal. Rather, they analyze this case as if they were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under § 2254.

It makes a big difference. Federal habeas relief is not available simply because a federal court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The California Court of Appeal examined defense counsel's closing argument. It pointed out that counsel "argued that he had never found a prosecutor who did not claim to know what had happened in a case, but urged the prosecutor was not present at the incident." The court noted that counsel "commented on Williams's various versions of his testimony" and that counsel "urged that the question was whether appellant intended to stab Handy." The California Court of Appeal noted that counsel argued that the jury must not assume that his client was guilty just because he had a prior record. It then said:

It is settled that "[t]he effectiveness of an advocate's oral presentation is difficult to judge from a written transcript, and the length of an argument is not a sound measure of its quality." (*People v. Cudjo,* (1993) 6 Cal.4th 585, 634-635, 25 Cal.Rptr.2d 390, 863 P.2d 635.) We have noted above portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of Williams's testimony, whether appellant intended to stab [Handy], and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of guilt, we conclude appellant was not denied his constitutional right to effective assistance of counsel. [Citations omitted.] None of the cases cited by appellant compels a contrary conclusion. [Footnote 5:] This includes *U.S. v. Cronic* (1984) 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 ... since, based on the above, counsel did not "entirely fail[ ]" to subject the prosecution's case to meaningful adversarial test.

Judges might agree or disagree with that analysis, but it is difficult to see how it can be said to be unreasonable, especially in light of *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In *Bell,* a death penalty case, defense counsel made no closing argument whatsoever. In upholding the denial of habeas relief, the Court said:

> For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the



> facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.
>
> . . . . .
>
> Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "rejected out of hand" the idea that waiving summation could ever be considered sound trial strategy. 243 F.3d, at 979. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable."

122 S.Ct. at 1852, 1853-54 (citations omitted).

The Court also took the opportunity to reiterate the caution it issued in *Strickland.* Said the *Bell* Court:

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.

*Id.* at 1854.

After *Bell,* there is simply no way that the California Court of Appeal decision can be characterized as so off-the-wall as to be unreasonable. To reiterate, the Court of Appeal correctly noted that counsel had identified the sole issue (was the stabbing an accident?), linked his client's testimony to that issue, pointed out inconsistencies in the prosecution witnesses' testimony, and attempted to deal with the very unfavorable fact that his client's testimony had been severely impeached with

several prior felony convictions, some of which he initially denied.

My colleagues in the majority have pointed out various things that counsel could have argued but didn't, and things that counsel did in fact say that could have been said better. The same can be said of any closing argument. The majority points out that counsel didn't argue that the stab wound to the chest was "only" one-inch deep. That fact is not nearly as significant as the majority seems to think. What matters is that petitioner did not inflict a superficial scratch. To the contrary, the evidence showed that the stab wound Handy received occasioned a great loss of blood and required two-hours of emergency surgery by a vascular surgeon. Counsel's decision not to draw the jury's attention to the magnitude of the victim's wound is entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell,* 122 S.Ct. at 1854.

What particularly sticks in the majority's craw is that in attempting to deal with the evidence of his client's bad prior record, defense counsel argued: "If you don't think he's lying--bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary--he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994."

As Magistrate Judge Arthur Nakazato pointed out in his thorough Report and Recommendation, which was adopted by Judge Rafeedie, "The disparaging statements concerning petitioner ... and references to his criminal convictions were part of defense counsel's strategy to establish some degree of credibility with the jury by conceding his past acts, while simultaneously emphasizing that his bad character was irrelevant to the issue before the jury."



Ironically, the majority resorts to the same sort of rhetorical device when its says:

> [Petitioner's] version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was agitated, confused, and evasive. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of [petitioner's] testimony may, in fact be true, even in the light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument.

Opinion at 901.

Perhaps other lawyers would have handled the knotty problem of petitioner's lengthy rap sheet differently--or, indeed, the entire argument differently. No matter. The only thing that *does* matter is whether the California Court of Appeal was unreasonable--not just wrong, but unreasonable--in ruling that petitioner was not denied effective assistance of counsel. Since counsel's closing argument was no worse than no-closing-argument-at-all, as occurred in the Supreme Court case of *Bell v. Cone,* it follows that the California Court of Appeal cannot be said to have unreasonably applied federal law as determined by the Supreme Court. Therefore, I respectfully dissent.

APPENDIX B

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| LIONEL E. GENTRY,<br>*Petitioner-Appellant,*<br><br>v.<br><br>ERNIE ROE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,<br>*Respondents-Appellees.* | No. 00-55691<br>D.C. No.<br>CV-97-04867-ER-AN<br><br>ORDER AND AMENDED OPINION |

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
July 9, 2002—Pasadena, California

Filed August 8, 2002
Amended August 30, 2002

Before: Proctor Hug, Jr., Jerome Farris and
Barry G. Silverman, Circuit Judges

Opinion by Judge Farris;
Dissent by Judge Silverman

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that trial counsel's closing argument can constitute ineffective assistance of counsel when it ignores evidence in the record that helped his client, and highlights record and non-record evidence that hurt his client, including references to his client as a "bad person, lousy drug addict, stinking thief, jail bird."

Appellant Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue at Gentry's California state court trial was whether he did so intentionally or accidentally. At trial, Handy testified that on the fateful day she had smoked crack cocaine and recalled being stabbed twice. Handy testified that Gentry had not grabbed her, although she had testified at her preliminary hearing that he had. The surgeon who operated o Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a single stab wound. The prosecution's other witness was Albert Williams, a security guard working at a neighboring building, who testified that he and his partner "Pedro" had looked out the window of their third-floor office from where they could see Gentry and Handy, and that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. After the stabbing, Williams and his partner went to assist Handy and found the couple struggling over the knife. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."



The defense case consisted entirely of Gentry's testimony. Gentry testified that he had accidentally stabbed Handy during an altercation with a dope dealer. After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously numerous times. On cross-examination, he was impeached by the prosecution's serial recitation of his prior convictions, all of which he acknowledged in open court while expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

During closing argument, instead of asking the jury to acquit Gentry, his counsel made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel asserted that he did not know what happened or who was lying, implying that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He did not discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner, who was purportedly a disinterested witness, and the fact that Handy's wound would be consistent with an accidental stabbing if Handy was flimsily clad. Trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon. Due to his prior convictions. Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks abut Gentry. The California Court of Appeals affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry's petition for a writ of habeas corpus in federal district court was dismissed.

Gentry appealed.

[1] A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

[2] To prevail on a claim of ineffective assistance of counsel, Gentry had to show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. When considering whether counsel's performance was deficient, courts are highly deferential to counsel's performance, indulging a presumption that under the circumstances, the challenged action might be considered sound trial strategy. To show prejudice, Gentry must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[3] What was most striking about trial counsel's closing argument was that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that did matter, all of which would have helped his client's position. [4] Closing argument is not simply a *pro forma* aspect of te criminal case, but an essential one. The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation.

[5] To demonstrate prejudice, Gentry bore the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. [6] The sole question was one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife. [7] The jury was presented with an ineffectual closing



argument by defense counsel that failed to address the only aspects of the case that mattered. There was a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeals' decision to the contrary was unreasonable. [8] The judgment of the district court had to be reversed.

Judge Silverman dissented, writing that the sole issue was whether the California Court of Appeal's decision was an unreasonable application of clearly established federal la as determined by the Supreme Court of the United Sates, not whether trial counsel's closing argument on behalf of Gentry constituted ineffective assistance of counsel.

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## COUNSEL

James H. Locklin, Deputy Federal Public Defender (argued), Los Angeles, CA, for the petitioner-appellant.

Shawn A. McGahey (argued) and John R. Gorey, Deputy Attorney General of the State of California, for the respondents-appellees.

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## ORDER

The Opinion filed August 8, 2002, is amended as follows: on slip opinion page 11498, lines 16-17, change the sentence to read, "that sounds like a jump to me, but that's just [me]."

## OPINION

FARRIS, Circuit Judge.

We are asked to decide whether trial counsel's closing argument on behalf of petitioner Lionel Gentry constituted ineffective assistance of counsel. Trial counsel's election to ignore evidence in the record that helped his client and to highlight record and non-record evidence that hurt his client cannot be defended as non-prejudicial "trial strategy." We therefore reverse his conviction with instructions to grant the writ of habeas corpus unless the State chooses to retry Gentry.

### I

There is no question that on April 30, 1994, Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue was whether he did so intentionally or accidentally.

#### A. The Prosecution's Case

For a year and a half preceding the stabbing, Gentry and Handy lived together as boyfriend and girlfriend. At trial, Handy testified that on the fateful day she smoked crack cocaine and later went with Gentry to her aunt's apartment. Once there, she and her aunt smoked cocaine. She then departed for another apartment in the building, a "crack house," where she smoked more cocaine and drank liquor. Later that night, Gentry came to get her, they argued, and at some point she was stabbed. Handy could not remember the details of what happened.

Faced with her inability to recall the events of April 30th, the prosecution showed Handy her preliminary hearing testimony. Although Handy recalled testifying at the preliminary hearing, she couldn't remember most of the answers reflected in the transcript, including the events surrounding the



stabbing. At the preliminary hearing, Handy testified that Gentry had placed his hand around her throat and later stabbed her twice, the second stab wound landing a few inches away from the first wound. At trial, Handy testified that Gentry never grabbed her, but recalled being stabbed twice.

The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a *single* stab wound.

The prosecution's other witness was Albert Williams, a security guard working at a neighboring building. He testified that, at about 9:45 p.m., his attention was drawn to the nearby building when he heard a man and woman arguing. Williams and his partner Pedro looked out the window of their third- floor office from where they could see Gentry and Handy as well as another man about 15 feet ahead of the couple. Although he testified at the preliminary hearing that it was "pretty dark," Williams testified at trial that it was "getting dark" and "it wasn't that dark." Upon redirect examination, he said that the area where the stabbing took place was "lighted up."

Williams testified that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. He saw Gentry "grab[ ] her from falling to the floor." He then witnessed Handy try to push him away while grabbing for the unidentified object in Gentry's hand. At about this time, the second, unidentified man left Williams' field of vision.

After the stabbing, Williams and his partner Pedro left the third-floor landing of their building, went down two flights of stairs to the first floor, and jumped a six-foot-high gate to assist Handy. He found the couple struggling over the knife. Williams heard Gentry and Handy saying things to one another but could not remember what they said. Williams and his partner Pedro intervened and subdued Gentry. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."

**B. The Defense Case**

The defense case consisted entirely of Gentry's testimony. According to Gentry, at about 10 p.m., he went looking for Handy within her aunt's building. He found her getting high in a first-floor apartment "crack house." To get to that apartment, Gentry had to pass through a gate, but because he did not have a key, he used a knife from the aunt's apartment to open the lock. When he entered the apartment, Handy was in a back room with another man. Gentry and Handy began arguing and left the apartment, to be followed by a dope dealer. As they were walking down the alleyway between buildings, Gentry and the other man, the dope dealer, got into a physical altercation. Handy tried to intervene several times by grabbing Gentry; he repeatedly pushed her away. At some point, Gentry threatened the dope dealer with the knife and when Handy tried to intervene again, he pushed her away with his right hand, which carried the knife, and accidentally stabbed her. The dope dealer then ran off.

At first, Gentry neither realized nor believed that he had stabbed Handy, but once he figured out what had happened, he tried to help her. Williams and his partner then arrived on the scene and told him to back away from Handy. Gentry refused, repeatedly saying "that's my woman," until finally he was handcuffed by Williams and Pedro. Gentry testified that he never intended to stab Handy.

After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously of burglary, grand theft, battery on a police officer, and being a felon in possession of a firearm. On direct examination, he expressed confusion over whether the term "conviction" covered "plea bargains." On cross-examination, he was impeached by the prosecution's serial recitation of his prior convictions, all of which he acknowledged in open court while still expressing confusion over whether "conviction"



covered cases for which he pleaded guilty and did not receive jail time.

**C. Closing Arguments**

In her closing argument, the prosecutor zealously advocated for a guilty verdict. She expressed sympathy for Handy and her unfortunate circumstances-- the fact that Handy was a pregnant drug-addict with three children--and argued that Handy's preliminary hearing testimony should be believed despite her protestations at trial that she could not remember what had happened. The prosecutor then argued that Gentry's testimony was "a pack of lies," and that the testimony of eyewitness Williams, who had no reason to lie, contradicted Gentry's version of the events.

In contrast, defense counsel's summation to the jury was casual and perfunctory. The argument in its entirety was as follows:

> I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D.A. that wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light.
>
> Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the truth chair. You heard people testify. You heard good

things that made you feel good. You heard bad things that made you feel bad.

I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.

The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.

He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.

I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just [me]. I'm not one of the 12 over there.

All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a



decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.

So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.

Thank you.

In her rebuttal argument, the prosecutor capitalized on the weakness of defense counsel's summation. She pointed out that, despite defense counsel's suggestion to the contrary, the jury could and should decide who was lying and who was telling the truth, as is consistent with the concept of a trial by jury. She then repeated that Williams' testimony was believable, dispositive, and clearly contradicted Gentry's testimony.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon in violation of California Penal Code §§ 254(A)(1) and 12022.7(a). Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks about Gentry. The California Court of Appeals affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry then petitioned for a writ of habeas corpus in the district court. The magistrate judge issued a report and recommendation recommending dismissal of the petition with prejudice. The district court adopted the R & R and dismissed the petition. Gentry then appealed.

We granted a Certificate of Appealability limited to the issue of whether defense counsel's summation violated Gentry's Sixth Amendment right to effective assistance of counsel.

## II

[1][2] We review *de novo* the district court's denial of Gentry's 28 U.S.C. § 2254 habeas petition. *See Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000). A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or were "based on an unreasonable determination of the facts in light of the evidence presented in the state courts." 28 U.S.C. § 2254(d). "[I]t is not enough that the defendant convinces the federal court that, in its independent judgment, the state-court decision" applied the law incorrectly. *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Rather, to warrant habeas relief, the defendant must show that the state court applied federal law to the facts of his case in an "objectively unreasonable manner." *Id.*

The California Court of Appeals deemed trial counsel's closing argument to be an exercise of sound trial strategy that did not prejudice the outcome. We find that conclusion to be not only incorrect, but also to be an objectively unreasonable application of federal law.



## III

[3][4][5] To prevail on a claim of ineffective assistance of counsel, Gentry must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.[1] *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Visciotti v. Woodford,* 288 F.3d 1097, 1105 (9th Cir.2002). When considering whether counsel's performance was deficient, we are highly deferential to counsel's performance, indulging a presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Bell,* 122 S.Ct. at 1852 (internal quotations omitted). To show prejudice, Gentry must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

### A. Deficient Performance

[6][7] Gentry "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. The California Court of Appeals determined that the performance of Gentry's counsel was not deficient, reasoning that he "addressed pertinent issues of the case, including the reliability of Williams' testimony, whether [Gentry] intended to stab Handy, and the significance of the prior impeachment evidence." That conclusion is objectively unreasonable.

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1. At oral argument, Gentry conceded that the Supreme Court's recent decision in *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), made it clear that *Strickland's* requirement that a defendant show both a deficiency and prejudice applies to the circumstances presented here. We therefore do not address his abandoned argument that prejudice should be presumed in accordance with *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

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What is most striking about trial counsel's closing argument is that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that *did* matter, all of which would have helped his client's position. Instead of asking the jury to acquit his client, he made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel's assertions that he did not know "what happened" or "who is lying" implied that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He didn't discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner "Pedro" who was purportedly a disinterested witness, and the fact that a one-inch deep wound inflicted by a six-inch knife would be consistent with an accidental stabbing if Handy was flimsily clad. Beyond the meek, personal statement "I don't know what happened," trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The prosecution's case hinged on (1) the jury believing Handy's preliminary hearing testimony and disbelieving her trial testimony, and (2) the jury accepting that Williams' testimony contradicted Gentry's testimony and indicated Gentry's intent to stab Handy. Defense counsel never discussed Handy's testimony, instead choosing to react to the prosecutor's expression of sympathy to the victim by noting, "I don't care that Tanaysha is pregnant. I don't care that she has three children.... What does that have to do with this case?" His sole reference to Williams' testimony was "Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw."



Trifling comments about inconsequential aspects of the case cannot be excused as trial strategy. At trial, Handy testified that at the time of her stabbing, she had been using crack cocaine "24 hours a day" for more than five years. She had also smoked "a lot" of crack in the early morning hours on the day of the preliminary hearing and was feeling its effects when she testified. She acknowledged that when she is high, she sees "weird things," including ghosts. She testified at trial and at the preliminary hearing that she was stabbed twice when there is no question she was stabbed only once. In closing argument, defense counsel mentioned none of this.

Williams' testimony is not inconsistent with an accidental stabbing. From the third floor of a neighboring building, Williams witnessed Gentry strike Handy with an object later found to be a knife. Williams testified that after he ran downstairs and hopped over a fence, all three of them struggled over the knife, but when the knife fell to the ground, Gentry didn't try to retrieve it, he kept moving toward Handy while saying again and again, "she's my girlfriend." Williams' testimony about the lighting is important, but only to the extent to which it casts doubt on the conclusion that Gentry stabbed Handy intentionally. Trial counsel's only comment on any part of Williams' testimony was "[t]hose are the three versions of his testimony with regard to what he saw and what he saw." Such statements qualify, at best, as passive recitations of facts, not as argumentation.

Gentry's version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was at times agitated, confused, and evasive. He demonstrated the stabbing by inappropriately touching the prosecutor. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of Gentry's testimony may, in fact, be true, even in light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing

his client during closing argument. *See, e.g., United States v. Swanson,* 943 F.2d 1070 (9th Cir.1991) (finding defense counsel's representation to be deficient where he conceded in closing argument that no reasonable doubt existed and proceeded to discuss the importance of the judicial system).

Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one:

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact there may be reasonable doubt of the defendant's guilt....
>
> .... In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

*Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation. The California Court of Appeals' decision to the contrary was unreasonable.

**B. Prejudicial Effect**

[8][9] To demonstrate prejudice, Gentry bears the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. "A



'reasonable probability' is *less than* a preponderance: [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Visciotti,* 288 F.3d at 1108 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

The California Court of Appeals found there to be "overwhelming evidence of [Gentry's] guilt." We disagree. The sole question is one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony that Gentry grabbed her throat before stabbing her twice, testimony given under the influence of crack cocaine, later disavowed, and shown to be inconsistent with the physical evidence of a single stab wound. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife, an object that was later dropped and ignored in Gentry's attempt to get closer to his girlfriend.

The jury was presented with an ineffectual closing argument by defense counsel that failed to address the only aspects of the case that mattered. Nevertheless, the jury deliberated for six hours before returning a verdict. We find there to be a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeals' decision to the contrary was unreasonable.

**IV**

Trial counsel's rambling, perfunctory closing argument violated petitioner Lionel Gentry's Sixth Amendment right to effective assistance of counsel. The California Court of Appeals' decision to the contrary was an objectively unreasonable application of federal law. We reverse the district court's denial of a writ of habeas corpus, vacate Gentry's conviction, and remand to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period grants a new trial.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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SILVERMAN, Circuit Judge, dissenting.

The majority frames the issue as follows: "We are asked to decide whether trial counsel's closing argument on behalf of petitioner Lionel Gentry constituted ineffective assistance of counsel." Opinion at 1009. With all due respect, that is not the issue at all. The sole question before us is whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. This mistake goes a long way toward explaining why the majority says virtually nothing about the holding of the California Court of Appeal. It also explains why the majority analyzes this case as if it were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under § 2254.

It makes a big difference. Federal habeas relief is not available simply because a federal court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor,* 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The California Court of Appeal examined defense counsel's closing argument. It pointed out that counsel "argued that he had never found a prosecutor who did not claim to know what had happened in a case, but urged the prosecutor was not present at the incident." The court noted that counsel "commented on Williams's various versions of his testimony" and that counsel "urged that the question was whether appellant intended to stab Handy." The California Court of Appeal noted that counsel argued that the jury must not assume that his client was guilty just because he had a prior record. It then said:



> It is settled that "[t]he effectiveness of an advocate's oral presentation is difficult to judge from a written transcript, and the length of an argument is not a sound measure of its quality." (*People v. Cudjo,* (1993) 6 Cal.4th 585, 634-635, 25 Cal.Rptr.2d 390, 863 P.2d 635.) We have noted above portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of Williams's testimony, whether appellant intended to stab [Handy], and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of guilt, we conclude appellant was not denied his constitutional right to effective assistance of counsel. [Citations omitted.] None of the cases cited by appellant compels a contrary conclusion. [Footnote 5:] This includes *U.S. v. Cronic* (1984) 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 ... since, based on the above, counsel did not "entirely fail[ ]" to subject the prosecution's case to meaningful adversarial test.

Judges might agree or disagree with that analysis, but it is difficult to see how it can be said to be unreasonable, especially in light of *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In *Bell,* a death penalty case, defense counsel made no closing argument whatsoever. In upholding the denial of habeas relief, the Court said:

> For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an

objectively unreasonable manner. This, we conclude, he cannot do.

. . . . .

Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "rejected out of hand" the idea that waiving summation could ever be considered sound trial strategy. [*Cone v. Bell*] 243 F.3d [961] 979 [(6th Cir.2001)]. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable."

[22 S.Ct. at 1852, 1853-54 (citations omitted).

The Court also took the opportunity to reiterate the caution it issued in *Strickland*. Said the *Bell* Court:

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.

*Id.* at 1854.

After *Bell*, there is simply no way that the California Court of Appeal decision can be characterized as so off-the-wall as to be unreasonable. To reiterate, the Court of Appeal correctly noted that counsel had identified the sole issue (was the stabbing an accident?), linked his client's testimony to that issue, pointed out inconsistencies in the prosecution witnesses' testimony, and attempted to deal with the very unfavorable fact that his client's testimony had been severely impeached with



several prior felony convictions, some of which he initially denied.

My colleagues in the majority have pointed out various things that counsel could have argued but didn't, and things that counsel did in fact say that could have been said better. The same can be said of any closing argument. The majority points out that counsel didn't argue that the stab wound to the chest was "only" one-inch deep. That fact is not nearly as significant as the majority seems to think. What matters is that petitioner did not inflict a superficial scratch. To the contrary, the evidence showed that the stab wound Handy received occasioned a great loss of blood and required two-hours of emergency surgery by a vascular surgeon. Counsel's decision not to draw the jury's attention to the magnitude of the victim's wound is entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell,* 122 S.Ct. at 1854.

What particularly sticks in the majority's craw is that in attempting to deal with the evidence of his client's bad prior record, defense counsel argued: "If you don't think he's lying--bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary--he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994."

As Magistrate Judge Arthur Nakazato pointed out in his thorough Report and Recommendation, which was adopted by Judge Rafeedie, "The disparaging statements concerning petitioner ... and references to his criminal convictions were part of defense counsel's strategy to establish some degree of credibility with the jury by conceding his past acts, while simultaneously emphasizing that his bad character was irrelevant to the issue before the jury."

Ironically, the majority resorts to the same sort of rhetorical device when its says:

> [Petitioner's] version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was agitated, confused, and evasive. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of [petitioner's] testimony may, in fact be true, even in the light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument.

Opinion at 1014.

Perhaps other lawyers would have handled the knotty problem of petitioner's lengthy rap sheet differently--or, indeed, the entire argument differently. No matter. The only thing that *does* matter is whether the California Court of Appeal was unreasonable--not just wrong, but unreasonable--in ruling that petitioner was not denied effective assistance of counsel. Since counsel's closing argument was no worse than no-closing-argument-at-all, as occurred in the Supreme Court case of *Bell v. Cone,* it follows that the California Court of Appeal cannot be said to have unreasonably applied federal law as determined by the Supreme Court. Therefore, I respectfully dissent.



APPENDIX C

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| LIONEL E. GENTRY,<br>*Petitioner-Appellant,*<br><br>v.<br><br>ERNIE ROE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,<br>*Respondents-Appellees.* | No. 00-55691<br>D.C. No.<br>CV-97-04867-ER-AN<br><br>OPINION |

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
July 9, 2002—Pasadena, California

Filed August 8, 2002

Before: Proctor Hug, Jr., Jerome Farris and
Barry G. Silverman, Circuit Judges

Opinion by Judge Farris;
Dissent by Judge Silverman

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that trial counsel's closing argument can constitute ineffective assistance of counsel when it ignores evidence in the record that helped his client, and highlights record and non-record evidence that hurt his client, including references to his client as a "bad person, lousy drug addict, stinking thief, jail bird."

Appellant Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue at Gentry's California state court trial was whether he did so intentionally or accidentally. At trial, Handy testified that on the fateful day she had smoked crack cocaine and recalled being stabbed twice. Handy testified that Gentry had not grabbed her, although she had testified at her preliminary hearing that he had. The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a single stab wound. The prosecution's other witness was Albert Williams, a security guard working at a neighboring building, who testified that he and his partner "Pedro" had looked out the window of their third-floor office from where they could see Gentry and Handy, and that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. After the stabbing, Williams and his partner went to assist Handy and found the couple struggling over the knife. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."



The defense case consisted entirely of Gentry's testimony. Gentry testified that he had accidentally stabbed Handy during an altercation with a dope dealer. After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously numerous times. On cross-examination, he was impeached by the prosecution's serial recitation, of his prior convictions, all of which he acknowledged in open court while expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

During closing argument, instead of asking the jury to acquit Gentry, his counsel made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel asserted that he did not know what happened or who was lying, implying that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He did not discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner, who was purportedly a disinterested witness, and the fact that Handy's wound would be consistent with an accidental stabbing if Handy was flimsily clad. Trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon. Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks abut Gentry. The California Court of Appeals affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry's petition for a writ of habeas corpus in federal district court was dismissed.

Gentry appealed.

[1] A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United Sates, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

[2] To prevail on a claim of ineffective assistance of counsel, Gentry had to show both that counsel's performance was deficient, and that the performance prejudiced the defense. When considering whether counsel's performance was deficient, courts are highly deferential to counsel's performance, indulging a presumption that under the circumstances, the challenged action might be considered sound trial strategy. To show prejudice, Gentry must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[3] What was most striking about trial counsel's closing argument was that he mentioned a host a details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that did matter, all of which would have helped his client's position. [4] Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one. The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation.

[5] To demonstrate prejudice, Gentry bore the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. [6] The sole question was one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife. [7] The jury was presented with an ineffectual closing



argument by defense counsel that failed to address the only aspects of the case that mattered. There was a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeals' decision to the contrary was unreasonable. [8] The judgment of the district court had to be reversed.

Judge Silverman dissented, writing that the sole issue was whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, not whether trial counsel's closing argument on behalf of Gentry constituted ineffective assistance of counsel.

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## COUNSEL

James H. Locklin, Deputy Federal Public Defender (argued), Los Angeles, CA, for the petitioner-appellant.

Shawn A. McGahey (argued) and John R. Gorey, Deputy Attorney General of the State of California, for the respondents-appellees.

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## OPINION

FARRIS, Circuit Judge.

We are asked to decide whether trial counsel's closing argument on behalf of petitioner Lionel Gentry constituted ineffective assistance of counsel. Trial counsel's election to ignore evidence in the record that helped his client and to highlight record and non-record evidence that hurt his client cannot be defended as non-prejudicial "trial strategy." We therefore reverse his conviction with instructions to grant the writ of habeas corpus unless the State chooses to retry Gentry.

# I

There is no question that on April 30, 1994, Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue was whether he did so intentionally or accidentally.

## A. The Prosecution's Case

For a year and a half preceding the stabbing, Gentry and Handy lived together as boyfriend and girlfriend. At trial, Handy testified that on the fateful day she smoked crack cocaine and later went with Gentry to her aunt's apartment. Once there, she and her aunt smoked cocaine. She then departed for another apartment in the building, a "crack house," where she smoked more cocaine and drank liquor. Later that night, Gentry came to get her, they argued, and at some point she was stabbed. Handy could not remember the details of what happened.

Faced with her inability to recall the events of April 30th, the prosecution showed Handy her preliminary hearing testimony. Although Handy recalled testifying at the preliminary hearing, she couldn't remember most of the answers reflected in the transcript, including the events surrounding the stabbing. At the preliminary hearing, Handy testified that Gentry had placed his hand around her throat and later stabbed her twice, the second stab wound landing a few inches away from the first wound. At trial, Handy testified that Gentry never grabbed her, but recalled being stabbed twice.

The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a *single* stab wound.

The prosecution's other witness was Albert Williams, a security guard working at a neighboring building. He testified that, at about 9:45 p.m., his attention was drawn to the nearby building when he heard a man and woman arguing. Williams and his partner Pedro looked out the window of their third- floor office from where they could see Gentry and Handy as well as



another man about 15 feet ahead of the couple. Although he testified at the preliminary hearing that it was "pretty dark," Williams testified at trial that it was "getting dark" and "it wasn't that dark." Upon redirect examination, he said that the area where the stabbing took place was "lighted up."

Williams testified that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. He saw Gentry "grab[ ] her from falling to the floor." He then witnessed Handy try to push him away while grabbing for the unidentified object in Gentry's hand. At about this time, the second, unidentified man left Williams' field of vision.

After the stabbing, Williams and his partner Pedro left the third-floor landing of their building, went down two flights of stairs to the first floor, and jumped a six-foot-high gate to assist Handy. He found the couple struggling over the knife. Williams heard Gentry and Handy saying things to one another but could not remember what they said. Williams and his partner Pedro intervened and subdued Gentry. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."

## B. The Defense Case

The defense case consisted entirely of Gentry's testimony. According to Gentry, at about 10 p.m., he went looking for Handy within her aunt's building. He found her getting high in a first-floor apartment "crack house." To get to that apartment, Gentry had to pass through a gate, but because he did not have a key, he used a knife from the aunt's apartment to open the lock. When he entered the apartment, Handy was in a back room with another man. Gentry and Handy began arguing and left the apartment, to be followed by a dope dealer. As they were walking down the alleyway between buildings, Gentry and the other man, the dope dealer, got into a physical altercation. Handy tried to intervene several times by grabbing Gentry; he

repeatedly pushed her away. At some point, Gentry threatened the dope dealer with the knife and when Handy tried to intervene again, he pushed her away with his right hand, which carried the knife, and accidentally stabbed her. The dope dealer then ran off.

At first, Gentry neither realized nor believed that he had stabbed Handy, but once he figured out what had happened, he tried to help her. Williams and his partner then arrived on the scene and told him to back away from Handy. Gentry refused, repeatedly saying "that's my woman," until finally he was handcuffed by Williams and Pedro. Gentry testified that he never intended to stab Handy.

After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously of burglary, grand theft, battery on a police officer, and being a felon in possession of a firearm. On direct examination, he expressed confusion over whether the term "conviction" covered "plea bargains." On cross-examination, he was impeached by the prosecution's serial recitation of his prior convictions, all of which he acknowledged in open court while still expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

**C. Closing Arguments**

In her closing argument, the prosecutor zealously advocated for a guilty verdict. She expressed sympathy for Handy and her unfortunate circumstances-- the fact that Handy was a pregnant drug-addict with three children--and argued that Handy's preliminary hearing testimony should be believed despite her protestations at trial that she could not remember what had happened. The prosecutor then argued that Gentry's testimony was "a pack of lies," and that the testimony of eyewitness Williams, who had no reason to lie, contradicted Gentry's version of the events.



In contrast, defense counsel's summation to the jury was casual and perfunctory. The argument in its entirety was as follows:

> I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D.A. that wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light.
>
> Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the truth chair. You heard people testify. You heard good things that made you feel good. You heard bad things that made you feel bad.
>
> I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.
>
> The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.

He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.

I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just Kenneth Reed. I'm not one of the 12 over there.

All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.

So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.

Thank you.



In her rebuttal argument, the prosecutor capitalized on the weakness of defense counsel's summation. She pointed out that, despite defense counsel's suggestion to the contrary, the jury could and should decide who was lying and who was telling the truth, as is consistent with the concept of a trial by jury. She then repeated that Williams' testimony was believable, dispositive, and clearly contradicted Gentry's testimony.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon in violation of California Penal Code §§ 254(A)(1) and 12022.7(a). Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks about Gentry. The California Court of Appeals affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry then petitioned for a writ of habeas corpus in the district court. The magistrate judge issued a report and recommendation recommending dismissal of the petition with prejudice. The district court adopted the R & R and dismissed the petition. Gentry then appealed.

We granted a Certificate of Appealability limited to the issue of whether defense counsel's summation violated Gentry's Sixth Amendment right to effective assistance of counsel.

## II

[1][2] We review *de novo* the district court's denial of Gentry's 28 U.S.C. § 2254 habeas petition. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir.2000). A federal court may grant a writ of habeas to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or were "based on an unreasonable determination of the

facts in light of the evidence presented in the state courts." 28 U.S.C. § 2254(d). "[I]t is not enough that the defendant convinces the federal court that, in its independent judgment, the state-court decision" applied the law incorrectly. *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Rather, to warrant habeas relief, the defendant must show that the state court applied federal law to the facts of his case in an "objectively unreasonable manner." *Id.*

The California Court of Appeals deemed trial counsel's closing argument to be an exercise of sound trial strategy that did not prejudice the outcome. We find that conclusion to be not only incorrect, but also to be an objectively unreasonable application of federal law.

## III

[3][4][5] To prevail on a claim of ineffective assistance of counsel, Gentry must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.[1] *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Visciotti v. Woodford,* 288 F.3d 1097, 1105 (9th Cir.2002). When considering whether counsel's performance was deficient, we are highly deferential to counsel's performance, indulging a presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Bell,* 122 S.Ct. at 1852 (internal quotations omitted). To show prejudice, Gentry must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

1. At oral argument, Gentry conceded that the Supreme Court's recent decision in *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), made it clear that *Strickland's* requirement that a defendant show both a deficiency and prejudice applies to the circumstances presented here. We therefore do not address his abandoned argument that prejudice should be presumed in accordance with *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).



been different." *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

### A. Deficient Performance

[6][7] Gentry "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. The California Court of Appeals determined that the performance of Gentry's counsel was not deficient, reasoning that he "addressed pertinent issues of the case, including the reliability of Williams' testimony, whether [Gentry] intended to stab Handy, and the significance of the prior impeachment evidence." That conclusion is objectively unreasonable.

What is most striking about trial counsel's closing argument is that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that *did* matter, all of which would have helped his client's position. Instead of asking the jury to acquit his client, he made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial counsel's assertions that he did not know "what happened" or "who is lying" implied that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He didn't discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner "Pedro" who was purportedly a disinterested witness, and the fact that a one-inch deep wound inflicted by a six-inch knife would be consistent with an accidental stabbing if Handy was flimsily clad. Beyond the meek, personal statement "I don't know what happened," trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The prosecution's case hinged on (1) the jury believing Handy's preliminary hearing testimony and disbelieving her trial testimony, and (2) the jury accepting that Williams' testimony contradicted Gentry's testimony and indicated Gentry's intent to stab Handy. Defense counsel never discussed Handy's testimony, instead choosing to react to the prosecutor's expression of sympathy to the victim by noting, "I don't care that Tanaysha is pregnant. I don't care that she has three children.... What does that have to do with this case?" His sole reference to Williams' testimony was "Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw."

Trifling comments about inconsequential aspects of the case cannot be excused as trial strategy. At trial, Handy testified that at the time of her stabbing, she had been using crack cocaine "24 hours a day" for more than five years. She had also smoked "a lot" of crack in the early morning hours on the day of the preliminary hearing and was feeling its effects when she testified. She acknowledged that when she is high, she sees "weird things," including ghosts. She testified at trial and at the preliminary hearing that she was stabbed twice when there is no question she was stabbed only once. In closing argument, defense counsel mentioned none of this.

Williams' testimony is not inconsistent with an accidental stabbing. From the third floor of a neighboring building, Williams witnessed Gentry strike Handy with an object later found to be a knife. Williams testified that after he ran downstairs and hopped over a fence, all three of them struggled over the knife, but when the knife fell to the ground, Gentry didn't try to retrieve it, he kept moving toward Handy while saying again and again, "she's my girlfriend." Williams' testimony about the lighting is important, but only to the extent to which it casts doubt on the conclusion that Gentry stabbed Handy intentionally. Trial counsel's only comment on any part of Williams' testimony was "[t]hose are the three versions of his testimony with regard to what he saw and what he saw." Such



statements qualify, at best, as passive recitations of facts, not as argumentation.

Gentry's version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was at times agitated, confused, and evasive. He demonstrated the stabbing by inappropriately touching the prosecutor. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of Gentry's testimony may, in fact, be true, even in light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument. *See, e.g., United States v. Swanson,* 943 F.2d 1070 (9th Cir.1991) (finding defense counsel's representation to be deficient where he conceded in closing argument that no reasonable doubt existed and proceeded to discuss the importance of the judicial system).

Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one:

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact there may be reasonable doubt of the defendant's guilt....
>
> .... In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

*Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation. The California Court of Appeals' decision to the contrary was unreasonable.

**B. Prejudicial Effect**

[8][9] To demonstrate prejudice, Gentry bears the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. "A 'reasonable probability' is *less than* a preponderance: [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Visciotti,* 288 F.3d at 1108 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

The California Court of Appeals found there to be "overwhelming evidence of [Gentry's] guilt." We disagree. The sole question is one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony that Gentry grabbed her throat before stabbing her twice, testimony given under the influence of crack cocaine, later disavowed, and shown to be inconsistent with the physical evidence of a single stab wound. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife, an object that was later dropped and ignored in Gentry's attempt to get closer to his girlfriend.

The jury was presented with an ineffectual closing argument by defense counsel that failed to address the only aspects of the case that mattered. Nevertheless, the jury deliberated for six hours before returning a verdict. We find there to be a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeals' decision to the contrary was unreasonable.



**IV**

Trial counsel's rambling, perfunctory closing argument violated petitioner Lionel Gentry's Sixth Amendment right to effective assistance of counsel. The California Court of Appeals' decision to the contrary was an objectively unreasonable application of federal law. We reverse the district court's denial of a writ of habeas corpus, vacate Gentry's conviction, and remand to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period grants a new trial.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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SILVERMAN, Circuit Judge, dissenting.

The majority frames the issue as follows: "We are asked to decide whether trial counsel's closing argument on behalf of petitioner Lionel Gentry constituted ineffective assistance of counsel." Opinion at 1009. With all due respect, that is not the issue at all. The sole question before us is whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. This mistake goes a long way toward explaining why the majority says virtually nothing about the holding of the California Court of Appeal. It also explains why the majority analyzes this case as if it were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under § 2254.

It makes a big difference. Federal habeas relief is not available simply because a federal court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor,* 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The California Court of Appeal examined defense counsel's closing argument. It pointed out that counsel "argued that he had never found a prosecutor who did not claim to know what had happened in a case, but urged the prosecutor was not present at the incident." The court noted that counsel "commented on Williams's various versions of his testimony" and that counsel "urged that the question was whether appellant intended to stab Handy." The California Court of Appeal noted that counsel argued that the jury must not assume that his client was guilty just because he had a prior record. It then said:

> It is settled that "[t]he effectiveness of an advocate's oral presentation is difficult to judge from a written transcript, and the length of an argument is not a sound measure of its quality." (*People v. Cudjo,* (1993) 6 Cal.4th 585, 634-635, 25 Cal.Rptr.2d 390, 863 P.2d 635.) We have noted above portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of Williams's testimony, whether appellant intended to stab [Handy], and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of guilt, we conclude appellant was not denied his constitutional right to effective assistance of counsel. [Citations omitted.] None of the cases cited by appellant compels a contrary conclusion. [Footnote 5:] This includes *U.S. v. Cronic* (1984) 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 ... since, based on the above, counsel did not "entirely fail[ ]" to subject the prosecution's case to meaningful adversarial test.

Judges might agree or disagree with that analysis, but it is difficult to see how it can be said to be unreasonable, especially in light of *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In *Bell,* a death penalty case, defense



counsel made no closing argument whatsoever. In upholding the denial of habeas relief, the Court said:

> For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.
>
> * * *
>
> Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "rejected out of hand" the idea that waiving summation could ever be considered sound trial strategy. [*Cone v. Bell*] 243 F.3d [961] 979 [(6th Cir.2001)]. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable."

122 S.Ct. at 1852, 1853-54 (citations omitted).

The Court also took the opportunity to reiterate the caution it issued in *Strickland.* Said the *Bell* Court:

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.

*Id.* at 1854.

After *Bell,* there is simply no way that the California Court of Appeal decision can be characterized as so off-the-wall as to be unreasonable. To reiterate, the Court of Appeal correctly noted that counsel had identified the sole issue (was the stabbing an accident?), linked his client's testimony to that issue, pointed out inconsistencies in the prosecution witnesses' testimony, and attempted to deal with the very unfavorable fact that his client's testimony had been severely impeached with several prior felony convictions, some of which he initially denied.

My colleagues in the majority have pointed out various things that counsel could have argued but didn't, and things that counsel did in fact say that could have been said better. The same can be said of any closing argument. The majority points out that counsel didn't argue that the stab wound to the chest was "only" one-inch deep. That fact is not nearly as significant as the majority seems to think. What matters is that petitioner did not inflict a superficial scratch. To the contrary, the evidence showed that the stab wound Handy received occasioned a great loss of blood and required two-hours of emergency surgery by a vascular surgeon. Counsel's decision not to draw the jury's attention to the magnitude of the victim's wound is entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell,* 122 S.Ct. at 1854.

What particularly sticks in the majority's craw is that in attempting to deal with the evidence of his client's bad prior record, defense counsel argued: "If you don't think he's lying--bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary--he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994."



As Magistrate Judge Arthur Nakazato pointed out in his thorough Report and Recommendation, which was adopted by Judge Rafeedie, "The disparaging statements concerning petitioner ... and references to his criminal convictions were part of defense counsel's strategy to establish some degree of credibility with the jury by conceding his past acts, while simultaneously emphasizing that his bad character was irrelevant to the issue before the jury."

Ironically, the majority resorts to the same sort of rhetorical device when its says:

> [Petitioner's] version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was agitated, confused, and evasive. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of [petitioner's] testimony may, in fact be true, even in the light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument.

Opinion at 1014.

Perhaps other lawyers would have handled the knotty problem of petitioner's lengthy rap sheet differently--or, indeed, the entire argument differently. No matter. The only thing that *does* matter is whether the California Court of Appeal was unreasonable--not just wrong, but unreasonable--in ruling that petitioner was not denied effective assistance of counsel. Since counsel's closing argument was no worse than no-closing-argument-at-all, as occurred in the Supreme Court case of *Bell v. Cone,* it follows that the California Court of Appeal cannot be said to have unreasonably applied federal law as determined by the Supreme Court. Therefore, I respectfully dissent.

APPENDIX D

FILED
JUL 12 1999

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

| | | |
|---|---|---|
| LIONEL E. GENTRY, | ) | Case No. CV-97-4867 ER (AN) |
| | ) | |
| Petitioner, | ) | REPORT AND |
| | ) | RECOMMENDATION OF |
| v. | ) | UNITED STATES |
| | ) | MAGISTRATE JUDGE TO |
| ERNIE ROE, et al., | ) | DENY PETITION FOR WRIT |
| | ) | OF HABEAS CORPUS |
| Respondents. | ) | |
| | ) | |

This Report and Recommendation is submitted to the Honorable Edward Rafeedie, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that the Court deny and dismiss with prejudice petitioner Lionel E. Gentry's petition for writ of habeas corpus.

## I. PROCEEDINGS

On October 3, 1997, petitioner Lionel E. Gentry ("petitioner") filed a First Amended Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition").- On January 20, 1998, respondent Ernie Roe, Warden of California State Prison at Lancaster ("respondent"), filed a Return to the First Amended Petition for Writ of Habeas Corpus (the

Return"). On February 10, 1998, petitioner filed his Traverse in Support of First Amended Petition for Writ of Habeas Corpus by a Person in State Custody (the "Traverse").

## II. BACKGROUND AND SUMMARY OF PETITIONER'S CONTENTION

### A. The Crime

On April 30, 1994, petitioner and the victim, Tanaysha Handy ("Handy") were boyfriend and girlfriend. [Reporter's Transcript ("RT") 50, 239-41.] Handy smoked cocaine and then went with petitioner to her aunt's apartment on Saticoy Avenue in Los Angeles County. [RT 51.] Petitioner testified that he left in order to steal food for Handy's children,[1/] and, when he returned, Handy and her aunt were smoking crack. [RT 52, 104-05, 240-41.] Handy and her aunt left the apartment, which was on the third floor, and went to Handy's friend's apartment, which was in the same building on the first floor; the friend's apartment was a "crack house" and Handy and her aunt went there to get high. [RT 52-53, 105, 242-44.]

Petitioner went to the friend's apartment to get Handy, and the two argued.[2/] [RT 52-53, 242-43.] They left the apartment, still arguing, and petitioner stabbed Handy. [RT 138-43, 152, 192-93, 252-55, 280.]

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1. Although the discrepancy does not appear to be material, Handy testified the children were "not in my custody"; "they wasn't with me." [RT 107.]

2. It is unclear why petitioner and Handy were arguing. At the preliminary hearing, Handy testified that they argued about money she had received from her aunt; however, at trial, Handy initially testified she could not remember whey they argued and later testified she could not remember why they argued and later testified they argued because she did not want to leave her friend's apartment. [RT 60-62, 83, 100, 111-12.] Petitioner, on the other hand, testified that he was mad at Handy because she was having sex with another man for drugs. [RT 244-45, 278-79.]



Handy's stomach and diaphragm were lacerated, resulting in the stomach herniating into the chest and spilling its food particles out through the chest area. The wounds - - described by the treating physician as "serious" and "major trauma" - - required immediate surgery, which took about two hours, and Handy spent approximately one week in the hospital. [RT at 134-36.]

### B. Legal Proceedings

At trial, petitioner did not dispute that he stabbed Handy; rather, the principal issue was whether the stabbing was intentional or accidental.

Petitioner testified that the stabbing was accidental, that he did not intend to stab Handy. [RT 255, 280.] Petitioner claimed that the stabbing occurred while he was trying to push Handy away from him during an altercation with a drug dealer. [RT 252-53, 265-73, 278.]

Handy disavowed any memory of the event; however, her testimony at the preliminary hearing, which was brought out at trial, was that petitioner grabbed her, had his hand around her throat, struck her, took a steak knife with a jagged edge from his back pocket on his right side, and stabbed her twice. [RT 54-55, 65-69, 73-77.]

Most damaging to petitioner, however, was the testimony of Albert Williams ("Williams"), a security officer working in the building next door on the night in question. [RT 138.] He testified that he heard petitioner and Handy arguing and saw petitioner stab her. [RT 138-43, 158, 162, 170-71, 181-84, 192-93.] He then saw Handy trying unsuccessfully to push petitioner away and to grab the knife. [RT 142, 144, 150.] Williams struggled with petitioner, pulling him away from Handy and fighting for the knife. [RT 145-46, 172, 175, 185-86.] Williams heard Handy yell, "he stabbed me," a couple of times. [RT 152, 173.] Eventually, Williams and his partner

handcuffed petitioner and held him until the police arrived[3/]. [RT 152.]

During his summation, defense counsel pointed out that only petitioner, Handy, and Williams were present that night, and he repeatedly emphasized that neither he, the prosecutor, nor the jurors could really know what happened. [RT 289-91.] He stressed the apparent inconsistencies in Williams' testimony concerning the lighting, and he attempted to minimize any sympathy for Handy by stating: "I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case?" [RT 290.]

He further argued, in pertinent part, as follows:

> The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying, then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994. . . . [Y]ou can't just assume that because a guy has done a bunch of bad things that he's now done this thing. I don't known if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me . . . .
>
> All I ask you to dos is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

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3. On cross-examination, Williams testified that petitioner did not try to run away. [RT 176.]



. . .

> So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it. Thank you.

[RT 290-92.]

Petitioner was convicted by jury of assault with a deadly weapon plus the infliction of great bodily injury, with court findings that he suffered multiple prior felony convictions. [Return, Exhs. D and E; RT 318-19, 330-31.] On June 9, 1995, petitioner was sentenced to state prison for a term of 39 years to life. [Return, Exh. E; RT 339-41.]

On appeal, petitioner argued, *inter alia*, (as he does now in the Petition), that trial Counsel's performance during closing argument violated his right to the effective assistance of counsel. The pertinent details of this claim and the state court resolution of it are described below.

Petitioner contends that he was denied effective assistance of counsel because his lawyer failed to act as a partisan advocate during closing argument. The California Court of Appeal "noted . . . portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of Williams's testimony, whether appellant intended to stab Hardy [sic], and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of appellant's guilt, [the Court of Appeal] conclude[d] appellant was not denied his constitutional right to effective assistance of counsel." [Return, Exh. K, at 145.] With respect to petitioner's reliance on *United States v. Cronic*, 466 U.S. 646, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Court of Appeal found the case did not compel a contrary conclusion because "counsel did not 'entirely fail[]' to subject the prosecution's case to meaningful adversarial testing." [Return, Exh. K, at 145 (citing *Cronic*).]

The California Supreme Court denied petitioner's petition for review without prejudice, citing *People v. Superior Court* (*Romero*), 13 Cal.4th 497, 530 n.13, 53 Cal.Rptr.2d 789 (1996). This Petition followed.

## III. LEGAL STANDARD

Federal habeas corpus relief may be granted "only on the ground that [the state prisoner] is in custody in violation of the constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors of state law are not cognizable on federal habeas corpus. Id.; *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Additionally, pursuant to the "Antiterrorism and Effective Death Penalty Act of 1996" (the "AEDPA"), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)[4]. The Ninth Circuit has interpreted this section as follows:

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4. This action was filed after the effective date of the AEDPA and, therefore, the AEDPA amendments apply to the pending Petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, - - - U.S. - - -, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997).



> A state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth-Circuit-based law, but rather a writ may issue only when the state court decision is "contrary to, or involved an unreasonable application of," an authoritative decision of the Supreme Court.

*Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.), *as amended, cert. denied,* 521 U.S. 1111, 117 S.Ct. 2497, 138 L.Ed.2d (1997) (quoting 28 U.S.C. § 2254 (d)).

Consequently, federal district courts "are no longer permitted to apply [their] own jurisprudence, but must look exclusively to Supreme Court caselaw in reviewing [a state habeas petitioner's] claim." *Furman v. Wood*, 169 F.3d 1230, 1232 (9th Cir. 1999) (internal quotations omitted and citing *Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997)). In other words, "federal courts [should] not disturb state court determinations unless the state court has failed to follow the law ans explicated by the Supreme Court." *Davis v. Kramer*, 167 F.3d 494, 500(9th Cir. 1999), *as amended*.

In *Davis*, the Ninth Circuit defined "unreasonable application of clearly established Federal law" for the first time, stating:

> . . . a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

*Id.* The amount of care with which the state court considered the issue may be a factor in determining whether the state court's decision is reasonable. See *Jeffries v. Wood*, *supra*, 114 F.3d at 1500 (citation omitted). "[W]hen confronted with a state court decision that does not provide the basis of its decision, [a federal court must determine whether, **in light of an**

**independent review of the record and the relevant federal law**, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Garcia Delgado v. Lewis*, - - - F.3d - - -, 1999 WL 415523, *3 (9th Cir., Jun. 23, 1999) (emphasis added) (citing *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.), cert. denied, - - - U.S. - - -, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998)) ("Where . . . there is no indication of how the state court applied federal law to the facts of a case, a federal court must necessarily perform its own review of the record").[5/]

Because the state court's decision denying petitioner's claims was reasonable in light of applicable Supreme Court law, the magistrate judge recommends that the Petition be denied.

## IV. DISCUSSION

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court defined the general standard governing ineffective assistance of counsel claims. Under this standard, a petitioner generally must prove: (1) his "counsel's representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Id.* at 688, 694 (the "*Strickland* standard").

> In reviewing trial counsel's performance, the court will "strongly presume [] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986). Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will the petitioner meet this initial burden. Strickland, 466 U.S. at 690, 104 S.Ct. at 2068; Quintero-Barraza, 78 F.3d at 1348.

*McClain v. D.R. Hill*, - - - F.Supp.2d - - -, 1999 WL 345988, *7 (C.D.Cal. May 19, 1999).

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5. "Conducting an independent review of the record and applicable federal law when the state [court] has not articulated its reasoning is not the equivalent of applying a de novo standard of review to state court decisions under these circumstances; rather, it provides the method for ascertaining whether the state court's resolution of the case was 'contrary to, or involved an unreasonable application of, clearly established Federal law' under AEDPA." *Garcia Delgado v. Lewis*, *supra*, 1999 WL 415523, at *3 n.3.



An attorney is not deficient simply because he is not a perfect orator. Though not a model closing, the argument given by petitioner's lawyer did not fall below an objective standard of reasonableness. Defense counsel identified the primary issue, i.e., whether petitioner intended to stab Handy, and he linked that issue to petitioner's testimony that it was an accident. [RT 290.] He argued that Williams' testimony was inconsistent, thereby inferring that he was not a reliable or credible witness. [RT 289-90.] The disparaging statements concerning petitioner ("bad person, lousy drug addict, stinking thief, jail bird" [RT 290]) and references to his criminal convictions [RT 290-91] were part of defense counsel's strategy to establish some degree of credibility with the jury by conceding his past bad acts, while simultaneously emphasizing that his bad character was irrelevant to the issue before the jury. Thus, petitioner's trial counsel adopted the eminently reasonable tactic of portraying petitioner as someone who was "bad" but not so bad as to be capable of intentionally stabbing his own girlfriend. Finally, counsel reminded the jurors, albeit not with supreme eloquence, that they, not he nor the prosecutor, were the ultimate decision-makers and that they had

a serious and difficult decision to make, one of which they must be certain.[6/]

Certainly, as petitioner argues, his lawyer could have developed some arguments more fully, clearly, and forcefully.[7/] However, counsel was not required to make every conceivable argument and, absent compelling evidence to the contrary, this Court must presume that the sheepish manner in which he choose to make his points was "sound trial strategy."[8/] *Strickland v. Washington*, *supra*, 466 U.S. at 689 (internal quotation marks and citation omitted). Petitioner has not overcome this presumption.

In sum, petitioner's characterization of trial counsel's closing argument as an "abandonment" in which he "fail[ed] to perform as an advocate on behalf of his client" [Traverse at 5] is incorrect. Daniel Webster or Clarence Darrow he was not, but the *Strickland* measure of performance is not Mr. Webster or Mr. Darrow. Accordingly, petitioner's ineffective assistance of counsel claim with respect to his trial counsel's closing argument fails, and the denial of this claim by the California Court of Appeal was neither contrary to, nor an unreasonable application of, federal law under 28 U.S.C. § 2254(d).

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6. Counsel also suggested the possibility of a hung jury noting that, although he would like all twelve jurors to agree, if they did not, "I can't do anything about that either." [RT 291.]

7. In particular, trial counsel probably should have argued that the prosecution failed to meet its burden of proof beyond a reasonable doubt. However, in light of the multiple times the trial court instructed the jury on this issue, the omission by defense counsel was neither material nor prejudicial. [RT 298-99, 304, 308, 312.]

8. For example, although petitioner complains that defense counsel never specifically asked the jury to return a verdict in petitioner's favor, his concession that he (like the prosecutor and the jurors) was not there and did not know who, if anyone, was lying, may well have been an effort to establish credibility, with the jury by his honesty and to raise questions in the jurors' minds about both the integrity of the prosecutor and the jurors' ability to convict.



## RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: July 12, 1999

s/_____
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

FILED
JUL 12 1999

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

| | |
|---|---|
| LIONEL E. GENTRY, Petitioner, v. ERNIE ROE, et al., Respondents. | Case No. CV-97-4867 ER (AN)<br><br>ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE TO DENY PETITION FOR WRIT OF HABEAS CORPUS<br><br>**PROPOSED** |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the file, including the Magistrate Judge's Report and Recommendation.

IT IS ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

DATED: July ____, 1999.

s/_____
EDWARD RAFEEDIE
UNITED STATES DISTRICT COURT



LODGED
JUL 12 1999

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

| | |
|---|---|
| LIONEL E. GENTRY, Petitioner, v. ERNIE ROE, et al., Respondents. | Case No. CV-97-4867 ER (AN)<br><br>JUDGMENT<br><br>**PROPOSED** |

IT IS HEREBY ADJUDGED that this action is denied and dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: July ____, 1999

s/_____
EDWARD RAFEEDIE
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
JAN 9 1997

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

**IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE**

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent<br><br>v.<br><br>LIONEL EDWARDO GENTRY,<br><br>Defendant and Appellant | B094949<br><br>(Super.Ct.No. LA017401)<br>(Charles Peven, Judge) |

THE COURT:*

Lionel Edwardo Gentry appeals from the judgment entered following his conviction by jury of felonious assault with infliction of great bodily injury, with court findings that he suffered two prior felony convictions, two prior serious felony convictions, two prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 245, subd. (a)(1), 667, subd. (a), 667, subd.(d), 667.5, subd.(b), 12022.7.) He was sentenced to prison for 39 years to life and contends:

*CROSKEY, Acting, P.J., KITCHING, J., and ALDRICH, J.

"I. Trial counsel rendered ineffective assistance by abandoning his role as a partisan advocate and failing to present a defense. II. The trial court erred in using the same prior convictions to impose [Penal Code] section 667, subdivision (a) enhancements and to sentence appellant under the Three Strikes law." In a supplemental letter brief, appellant contends, in essence, that his case should be remanded in light of *People v. Superior Court* (*Romero*)(1996) 13 Cal.4th 497.

## FACTUAL SUMMARY

1. People's Evidence.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on April 30, 1994, Tanaysha Handy was appellant's girlfriend. Handy smoked cocaine and later went with appellant to Handy aunt's apartment on Saticoy Avenue in Los Angeles County. Handy's aunt gave drugs to appellant and Handy, and Handy went to a friend's apartment in the building and got high. Appellant went to that apartment to get Handy.

Appellant and Handy later argued. At one point, appellant had his hand around Handy's throat.[1/] Handy did not remembered testifying at the preliminary hearing that appellant stabbed her twice. Handy testified at trial that she was stabbed twice. She remembered a security officer ordering appellant to "'drop the knife.'" Handy never testified at the preliminary hearing that she was high, or that she could not remember what happened on April 30, 1994, because she was high.

At about 9:00 p.m. to 10:00 p.m. on April 30, 1994, Albert Williams, the building's security officer, heard an argument between a man and a woman and observed a man about 15 feet ahead of appellant and a woman. It was dark but there were a few lights and Williams could see what was happening.

1. Handy denied this at trial but acknowledged she so testified at the preliminary hearing.



Williams observed appellant and the woman until they were just about to go to the street in a hallway. Appellant was ahead of the woman. Once they got to the hallway, appellant and the woman stopped. Appellant turned and swung his right hand, which had an object hidden in it, toward the woman, hitting her in the left side. The woman leaned forward and slowly screamed. During redirect examination, the prosecutor asked Williams how the lighting was "in th[e] area" where appellant stabbed the victim, and Williams replied it was light.

Appellant grabbed the woman "from falling to the floor," and the woman unsuccessfully attempted to push appellant away. The woman then grabbed the knife appellant held in his hand, bu the woman later let go. Williams observed that the object appellant had been holding was a knife with blood on it. Williams approached the two, pushed appellant away, and Williams and appellant struggled. At one point, appellant, still holding the knife, attempted to get at the woman again. Williams testified at the preliminary hearing that appellant wanted to be near Handy at all times. Appellant stated Handy was his girlfriend, and Handy yelled. The doctor who treated Handy testified she suffered one one-inch stab wound in her left lateral chest area.

2. *Defense Evidence.*

In defense, appellant testified that after 6:00 p.m. on the above date, Handy smoked crack with her aunt and, in another apartment, got high with friends. Appellant asked Handy for money and an altercation ensued between appellant and a dope dealer. Appellant pulled out a knife.[2/] Handy intervened, and appellant stabbed her accidentally.

2. At one point, the reporter's transcript reflects appellant testifying that the man with whom he had an altercation "pulled the knife out."

## DISCUSSION

1. *Appellant Was Not Denied Effective Assistance Of Counsel.*

Appellant contends trial counsel rendered ineffective assistance by abandoning his role as a partisan advocate and failing to present a defense. We disagree. Prior to trial, appellant moved to exclude for impeachment purposes two residential burglary convictions, one in 1983, the other on August 20, 1985; grand theft of personal property conviction; and a 1987 battery upon a peace officer conviction. Just before appellant's direct examination, with appellant present, the court ruled the two residential burglary convictions and the grand theft of personal property conviction were admissible for impeachment, although the residential burglary convictions would be referred to simply as first degree burglary convictions.[3] The court excluded the battery conviction. The court "supposed" it was a crime of moral turpitude, and expressed doubt concerning whether the fact that a peace officer was battered made the battery "more morally abhorrent." The court also excluded a 1984 felon in possession of a firearm conviction that was alleged in the information. The court expressed doubts whether that conviction involved a crime of moral turpitude.

At the conclusion of appellant's direct examination, the following occurred: "Q [Defense counsel]: I forgot to ask you something. [¶] Sir, you have been in custody in the past? [¶] A Yes. [¶] Q You committed a crime in the past? [¶] A Yes. [¶] Q Okay. Did you go to state prison? [¶] A Yeah, once. [¶] Q Okay. You have committed crimes that you didn't go to state prison and gone to court and been convicted of those; is that correct? [¶] A Once. I didn't get convicted. I don't understand what you said. [¶] Q The judge was sitting in the judge chair, there was a district attorney on this side, and you

3. Appellant does not challenge this ruling.



plead guilty? [¶] A To a burglary plea bargain, a deal. [¶] Q That's getting convicted. Judge convicts you of a crime even though you didn't go through a trial. [¶] You understand? [¶] A Yes. [¶] Q Okay. You have done that more than one time right? [¶] A No. Just once. [¶] Q All right. One was burglary? [¶] A Yeah, once burglary. [¶] Q And while you were in jail once you had a problem? [¶] A Yes. [¶] Q Okay. Are you telling the truth today? [¶] A Yes."

At sidebar, the court indicated appellant's counsel had created a problem. The prosecutor urged appellant had stated he was convicted only once, and therefore had lied. Defense counsel replied, "Fine. Impeach him. He also said he didn't understand what convicted was." The court indicated counsel should have asked about specific crimes, and counsel agreed. The following also occurred: "[Defense counsel]: Probably based upon the hearing I thought my client and I were going to be on the same page, I wouldn't have had to do that. There is not way for me to fix that without looking like I'm fixing, that's why I'm sitting down."

The court indicated it would permit more extensive impeachment with the prior convictions. Appellant's counsel stated "That's fine" and, later, "I don't think it's particularly important, you can handle it whichever way you want to." During cross-examination, the prosecutor impeached appellant with all five prior convictions. The prosecutor asked if appellant was convicted of residential burglary on August 20, 1985, and appellant replied without objection in the affirmative. Appellant expressed confusion concerning the meaning of the word "convicted." He later testified he did not know if he had suffered a July 20, 1983, first degree burglary conviction.

Appellant claims he received ineffective assistance of counsel in connection with his direct examination regarding his prior convictions. However, based on the above, there is no need to decide whether appellant's counsel's performance was deficient. Even if it was, appellant has failed to demonstrate that there is a reasonable probability that, but for any unprofessional errors of counsel, the result of the proceeding

would have been different. Appellant never moved to exclude for impeachment purposes the possession of a firearm by a felon conviction. Moreover, notwithstanding the trial court's suggestions that that conviction and the battery upon a peace office r conviction were inadmissible because they were not crimes of moral turpitude, both were crimes of moral turpitude. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1401; *People v. White* (1992) 4 Cal.App.4th 1299, 1304.) The jury was aware of appellant's expressions of confusion concerning the meaning of the word "convicted." Appellant does not challenge the admissibility for impeachment purposed of the two burglary convictions and the grand theft of personal property conviction, and he was effectively impeached by those.

Moreover, Handy and appellant argued. There was evidence appellant at one point had his hand on her throat. Handy testified at the preliminary hearing that appellant stabbed her, and she testified at trial that she was stabbed. A security guard ordered appellant to drop the knife. Williams testified, in essence, that he observed appellant stab Handy, and Handy repeatedly yelled that appellant had stabbed her. Appellant was the only person with Handy when she yelled. The jury was not obligated to believe the defense evidence. Accordingly, there was overwhelming evidence of appellant's guilt. Therefore, we conclude that appellant has failed to demonstrate prejudice from any of the challenged failings of trial counsel in connection with direct examination. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) None of the cases cited by appellant compels a contrary conclusion.

Appellant also claims he received ineffective assistance of counsel in connection with his counsel's jury argument. We reject the claim. Appellant's counsel waived opening statement "in interest of time," and appellant testified. During closing argument, appellant's counsel argued he had never found a prosecutor who did not claim to know what had happened in a case, but counsel urged the prosecutor was not present at the incident. Counsel commented on Williams's various testimony concerning lighting at the time of the incident and various



versions of his testimony. Counsel indicated that Handy had been stabbed, and urged that the question was whether appellant intended to stab Handy.

Counsel argued if the jury thought appellant was lying, he would have to be convicted. Counsel then argued that if the jury did not think appellant was lying, "bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty."[4/] Counsel urged appellant did not understand the meaning of the word "conviction." Counsel also urged "you can't just assume that because a guy has done a bunch of bad things that he's now doing this thing." Counsel asked the jury to make a decision, good or bad, and if the jury could not make a decision, counsel could not do anything about it. Counsel argued, "I don't know who's lying. I don't know if anybody is lying." Counsel encouraged the jury to consider
the evidence "and be sure that's what you want to do, then come out and do it."

It is settled that "[t]he effectiveness of an advocate's oral presentation is difficult to judge accurately from a written transcript, and the length of an argument is not a sound measure of its quality." (*People v. Cudjo* (1993) 6 Cal.4th 585, 634-635.) We have noted above portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of William's testimony, whether appellant intended to stab Hardy, and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of appellant's guilt, we conclude appellant was not denied his constitutional right to effective assistance of counsel. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 216-217; *People v.*

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4. During sentencing, the court told appellant's counsel, ". . . I thought you did a highly competent job in this matter. You did the best you can for Mr. Gentry. There wasn't all that much that could be done for Mr. Gentry, very honestly, insofar as the way the evidence was produced int his case and the facts of this case. [¶] Mr. Gentry chose to go to trial. And the factual evidence in this case was basically sort of overwhelming, and the jury certainly had no trouble with it and the judgment was entered."

*Pangelina* (1984) 153 Cal.App.3d 1, 6.) None of the cases cited by appellant compels a contrary conclusion.[5/]

*2. Imposition Of Sentence Pursuant To Penal Code Sections 667, Subdivision (a) And The Three Strikes Law Was Proper.*

Appellant contends the trial court erred in using the same prior convictions to impose Penal Code section 667, subdivision (a) enhancements and to sentence appellant under Three Strikes law. We reject the contention. The court found true allegations in the information that appellant suffered a 1983 first degree residential burglary conviction in case No. A530063 for purposes of Penal Code section 667, subdivision (a) and subdivisions (b) through (i), and a 1985 first degree residential burglary conviction in case No. A534481 for purposes of those subdivisions. Based on those conditions, appellant's sentence of 39 years to life included 25 years to life for the felonious assault pursuant to Penal Code section 667, subdivision (e)(2(A)(ii), plus two five-year terms pursuant to Penal Code section 667, subdivision (a).

We conclude, consistent with sound principles of statutory interpretation, that imposition of sentence pursuant to the Three Strikes law and Penal Code section 667, subdivision (a) was proper (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137-1139; *People v. Anderson* (1995) 35 Cal.App.4th 587, 592-599; *People v. Ramirez* (1995) 33 Cal.App.4th 559, 562-572), and did not constitute impermissible multiple punishment violative of Penal Code section 654. (*People v. Coronado* (1995) 12 Cal.4th 145, 149, 156-159; *People v. Cartwright, supra,* 39 Cal.App.4th at p. 1139; *People v. Anderson, supra,* 35

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5. This includes *U.S. v. Cronic* (1984) 466 U.S. 648 [80 L.Ed.2d 657] since, based on the above, counsel did not "entirely fail[]" to subject the prosecution's case to meaningful adversarial testing. (*U.S. v. Cronic, supra,* 466 U.S. at pp. 658-660 [80 L.Ed.2d at pp. 667-668].)



Cal.App.4th at pp. 599-600; *People v. Ramirez, supra,* 33 Cal.App.4th at pp. 572-573.)

3. *There Is No Need To Remand To Allow The Sentencing Court To Consider Exercising Its Discretion To Strike The Three Strikes Prior Conviction Allegations.*

Appellant contends, in essence, that his case should be remanded in light of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. We disagree. The probation report, which the court read and considered, reflects, apart from the above two first degree burglary convictions, that appellant suffered a 1983 grand theft of personal property conviction; a 1984 felony in possession of a firearm conviction; and a 1987 battery on emergency personnel conviction. Appellant was sentenced to state prison on the 1985 first degree residential burglary and 1987 battery on emergency personnel convictions; he committed offenses while on probation five times; and he violated parole three times. The report reflects that appellant's prior convictions as an adult were numerous and of increasing seriousness, and his prior performance on probation and parole was unsatisfactory. The report listed no mitigating factors, and recommended imposition of the "high-base term." The court sentenced appellant to prison as indicated in our discussion at 2. above. Appellant never asked the trial court to exercise its discretion pursuant to Penal Code section 1385 to strike those two qualifying prior burglary convictions.

In *People v. Superior Court (Romero), supra,* the Supreme Court held Penal Code section 1385 permits "a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes Law." (*People v. Superior Court (Romero) supra,* 13 Cal.4th at pp. 529-530. However, we conclude a remand for resentencing is inappropriate. Appellant waived the issue by his failure to ask the trial court to exercise its discretion to strike the qualifying prior convictions. (*People v. Askey* (1996) 49 Cal.App.4th 381, 388.) Moreover, even if the sentencing court erroneously

believed it did not possess discretion to strike such allegations on its own motion, remand inappropriate because, based on the record, including appellant's criminal record, the record clearly indicates the trial court would not have exercised its discretion to strike te qualifying prior convictions, and remand would constitute an idle act because any order striking the qualifying prior convictions would be an abuse of discretion. (*People v. Askey, supra,* 49 Cal.App.4th at p. 389.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Opposition Brief Unavailable for Filming at This Time